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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to require inmates to exhaust "such administrative remedies as are available" before initiating an action under federal law.

Does the amendment require prisoners to exhaust internal prison grievance processes that do not confer monetary awards before bringing actions solely for damages?

LIST OF PARTIES

Petitioner is Silvia H. Garcia, Chief Deputy Warden of Calipatria State Prison in California. Respondent is Monroe Jones, a prisoner incarcerated at Calipatria.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is set forth at Appendix 1a-2a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on February 2, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

This appeal concerns section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996), which amended 42 U.S.C. § 1997e.

As amended, § 1997e provides in relevant part as follows:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. IV 1998).

Before it was amended, § 1997e provided in relevant part as follows:

> (a) Applicability of administrative remedies
>
> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in

> substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e (1994).

STATEMENT OF THE CASE

Respondent Monroe Jones is a prisoner incarcerated at Calipatria State Prison in California. He brought this suit under 42 U.S.C. § 1983 (1994) by alleging that he was wrongly transferred to Calipatria from another state prison and that he was illegally placed in administrative segregation. In addition to damages, he asked to be single celled, to have "false statements" removed from his prison records, and to be given certain confidential documents. Chief Deputy Warden Garcia filed a motion to dismiss. The district court granted the motion and gave Jones leave to amend his complaint. Appendix 18a-32a.

In his amended complaint, Jones elaborated upon his previous allegations. He asserted that while he was in administrative segregation he was assaulted by his cell mate and correctional officers and was denied medical treatment, food, clothing, yard privileges, and access to the law library. He also claimed that he lost a prison job as a result of his transfer to Calipatria. According to Jones, these actions deprived him of his rights under the Eighth and Fourteenth Amendments.

Chief Deputy Warden Garcia filed a second motion to dismiss. Among other defenses, she argued that amended § 1997e compelled dismissal of the case because Garcia had failed to exhaust the administrative remedies that were available to him in Calipatria's internal grievance system. The district court agreed and granted the motion. Appendix 3a-17a.

Jones appealed. In his reply brief, he renounced his claims to injunctive relief. Based on this renunciation, the court of appeals reversed the district court's dismissal by relying on *Rumbles v. Hill*, 182 F.3d 1064 (1999), *cert. denied*, 120 S. Ct. 787 (2000).[1] Appendix 2a. In *Rumbles*, the Ninth Circuit concluded that § 1997e imposes no requirement on prisoners to exhaust internal grievance procedures that do not confer monetary awards before bringing suits solely for damages. 182 F.3d at 1067. In direct conflict with *Rumbles*, most circuits that have considered the issue have held that § 1997e requires inmates to exhaust existing internal prison grievance systems before bringing federal actions, regardless of the nature of the relief sought.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the timely opportunity to resolve the split among the circuits regarding the applicability of § 1997e's mandatory exhaustion requirement to prisoners' suits for damages. The Ninth Circuit's approach ignores the plain language and legislative history of § 1997e, and it impedes Congress's goals of reducing prisoner litigation, promoting efficient case management, and minimizing judicial intrusion in state prison affairs.

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1. The inmate in *Rumbles*, Macarthur Rumbles, died while the petition for certiorari was pending in that case.

I.

THERE IS A PRONOUNCED CONFLICT AMONG THE CIRCUITS WHETHER § 1997e REQUIRES PRISONERS TO EXHAUST INTERNAL GRIEVANCE PROCEDURES BEFORE BRINGING AN ACTION SOLELY FOR DAMAGES.

This petition should be granted to resolve the conflict among the circuits regarding the applicability of amended § 1997e's exhaustion requirement to prisoner suits that seek damages as the only remedy. The Ninth, Fifth, and Tenth Circuits hold that the statute imposes no bar on a prisoner's unexhausted claim for damages when money is the sole relief sought and it was unobtainable through the prison's grievance process. *Jones v. Garcia*, Appendix 2a (relying on *Rumbles v. Hill*, 182 F.3d at 1067); *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998); *but see Wright v. Hollingsworth*, 201 F.3d 663, 666 (5th Cir. 2000) (questioning the correctness of *Whitley* and urging the parties to seek an en banc review); *Garrett v. Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997).

Four circuits have adopted an opposite rule. The Sixth and Seventh Circuits squarely hold that § 1997e requires inmates to avail themselves of prison grievance procedures, even when these procedures do not provide monetary awards, before they may bring an action exclusively for damages. *Massey v. Helman*, 196 F.3d 727, 732 (7th Cir. 2000) (relying on *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537-38 (7th Cir. 1999)); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999); *see also Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). The Third and Eleventh Circuits are in express agreement with this view, although they adopted the position in cases in which the inmate sought both damages and injunctive relief. *Nyhuis v. Reno*, 204 F.3d 65, 71-72 (3d Cir. 2000) ("[W]e are convinced that the most sensible reading of § 1997e(a) is that the futility exception is not applicable in any

case"); *Alexander v. Hawk*, 159 F.3d 1321, 1325-26 (11th Cir. 1998) ("Since exhaustion is now a pre-condition to suit, the courts cannot simply waive those requirements where they determine they are futile or inadequate.").

The circuit conflict is entrenched. Several courts of appeals, including the Ninth Circuit, have commented on the split, its irreconcilability, and the confusion it has engendered. *Rumbles v. Hill*, 182 F.3d at 1068 ("Authorities are split."); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 537 ("[S]everal courts of appeals have gone the other way."); *Whitley v. Hunt*, 158 F.3d at 886 n.2 ("Among those federal district courts that have addressed the issue, there appears to be substantial disagreement."); *Wright v. Hollingsworth*, 201 F.3d at 666 ("*Whitley* conflicts with the interpretation of amended § 1997e(a) given by three other circuits."); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) ("Several circuits, as well as district courts in this circuit, are split on . . . whether the administrative exhaustion requirement is inapplicable where the relief requested – i.e., strictly monetary damages – is not 'available' through the administrative process.").

Because the conflict is irreconcilable in the circuits, the need for a resolution from the Court is acute. This petition should be granted because it presents a timely and expedient vehicle for the Court to settle the question conclusively.

II.

THE NINTH CIRCUIT'S APPROACH IGNORES THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF § 1997e.

As amended, § 1997e provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42

U.S.C. § 1997e(a) (Supp. IV 1998). The text is clear: if administrative procedures exist, inmates must use them before bringing federal lawsuits. There is nothing in the language to support the lower court's view that exhaustion is mandatory only when administrative programs dispense monetary awards or grant relief precisely congruent with the prisoners' desires.

If the text of the statute were not plain enough, its legislative evolution irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process. Former § 1997e contained a discretionary exhaustion standard applicable when the administrative process was "plain, speedy, and effective." 42 U.S.C. § 1997e(a)(1) (1994). In amending the statute, Congress pointedly deleted this requirement and confirmed that it expected exhaustion to be mandatory regardless whether the administrative process effectively dispenses relief to the prisoners' satisfaction. "[W]hen these words left the statute so did any warrant to inquire whether exhaustion would be unavailing." *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 536. The Eleventh Circuit elaborated on this observation:

> The removal of the qualifiers "plain, speedy, and effective" from the PLRA's mandatory exhaustion requirement indicates that Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is "available" in the prison involved.

Alexander v. Hawk, 159 F.3d at 1326. Interpreting § 1997e, as the court of appeals did in this case, to apply only when prison grievance systems provide all encompassing relief wrongly reintroduces the requirement of an effective administrative

remedy after Congress specifically deleted it. *Nyhuis v. Reno*, 204 F.3d at 72.

The importance of discerning congressional intent when construing statutory exhaustion requirements was emphasized by the Court in a case arising out of former § 1997e. In *McCarthy v. Madigan*, the Court examined the earlier version of the statute and concluded that it imposed no requirement on federal inmates to exhaust internal grievance procedures before seeking *Bivens* relief. 503 U.S. 140, 150-51 (1992). In reaching its conclusion, the Court provided straightforward instruction on how statutory exhaustion requirements are to be interpreted: "Of 'paramount importance' to any exhaustion inquiry is congressional intent." *Id.* at 144 (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). "[A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *Id.* "Where Congress specifically mandates, exhaustion is required." *Id.* (citing *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989)).

Four years after *McCarthy* was announced, the PLRA was enacted. Unopposed statements made during congressional floor debates reveal that § 1997e was amended in direct response to the Court's holding in *McCarthy* so as to impose on prisoners the obligation to exhaust all available administrative procedures before initiating federal actions, regardless whether they seek judicial relief by only requesting damages:

> The real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only. *McCarthy v. Madigan*, 112 S. Ct.

> 1081 (1992). This decision was made without the benefit of any legislative guidance and the Court made that point very clearly in its opinion, almost to the point of asking that Congress do something. . . . I am very pleased to say that I have worked with the conferees of H.R. 2076 to ensure that the prison litigation reform measures address the *Bivens* issue. The new administrative exhaustion language in H.R. 2076 will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to administrative remedy process before proceeding to court.

141 Cong. Rec. H14078-02, *H14105 (statement of Rep. Lobiondo). Because the PLRA was not passed as a committee bill, but rather was attached as a rider to an appropriations bill, "floor debate is more indicative of legislative intent than it otherwise would be, especially where the floor statements in favor of the bill remain uncontested as was the case with Congressman Lobiondo's remarks." *Garrett v. Hawk*, 127 F.3d at 1266 n.2; *see also Patsy v. Board of Regents of Florida*, 457 U.S. at 502-11 (relying on floor debates in interpreting statutory exhaustion requirement).

The Ninth Circuit has never examined the language or legislative evolution of § 1997e. In this case, it simply relied on its holding in *Rumbles* to support its conclusion that exhaustion is unnecessary. Appendix 2a. The opinion in *Rumbles* similarly contained no legislative analysis. It only declared that the court was bound to reject a mandatory exhaustion requirement for state inmates seeking damages because a similar approach had been adopted for federal prisoners. 182 F.3d at 1068-69 (citing *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998)). But the persuasive and

precedential value of the one-paragraph decision in *Lunsford* was exaggerated: The case was decided on a stipulation between the parties, and the opinion never mentioned, let alone evaluated, the text or evolution of the statute. 155 F.3d 1178.

The Ninth Circuit's refusal to require exhaustion for prisoner actions seeking exclusively damages "impose[s] an enormous loophole in the PLRA, which Congress clearly did not intend." *Alexander v. Hawk*, 159 F.3d at 1326. The text of amended § 1997e, its rejection of the earlier statute's requirement that the administrative remedy be effective, and other legislative circumstances confirm that by enacting the PLRA Congress intended to require prisoners to exhaust all claims administratively before initiating federal litigation, regardless whether the particular relief desired could be procured in the administrative process. The Ninth Circuit's approach ignores congressional intent, and this petition should be granted to review and correct the lower court's error.

III.

THE QUESTION PRESENTED IS IMPORTANT.

This petition should be granted because the Ninth Circuit's decision undermines the important goals of reducing prisoner litigation, promoting efficient case management, and minimizing judicial intrusion in state prison affairs.

First, by allowing inmates to avoid an administrative review of their complaints, the lower court's approach thwarts Congress's goal of reducing prisoner litigation. Under the Ninth Circuit's construction of amended § 1997e, prisoners must simply assert a claim for damages only -- or seek some other type of relief that cannot be bestowed in the administrative process -- to avoid the exhaustion requirement. This interpretation encourages inmates to file suits for damages and forecloses the possibility of an administrative resolution of

disputes. "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *McCarthy v. Madigan*, 503 U.S. at 145.

An increase in the number of prisoner lawsuits is exactly what Congress did not want when it passed the PLRA. Senators expressed frustration that the number of prisoner lawsuits "has grown astronomically -- from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14408-01, *S14413 (statement of Sen. Dole for himself and eleven other senators). In response to this burden, the PLRA was enacted to "curtail the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court." 141 Cong. Rec. H14078-02, *H14106 (statement of Rep. Canady). The lower court's decision should be reviewed because it impedes the achievement of this objective.

The Ninth Circuit's approach also interferes with the efficient judicial administration of prisoner cases. Under it, district courts are forced to parse out inexact allegations to ascertain the exact relief sought. It also requires "judges to act as detectives as they attempt[] to discover whether the local administrative process could have, would have, or might have afforded the inmate relief." *Nyhuis v. Reno*, 204 F.3d at 75. Furthermore, inefficiencies arise when exhaustion is excused because district courts are deprived of the opportunity to review contemporaneous administrative records. "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration . . . ." *McCarthy v. Madigan*, 503 U.S. at 145.

Finally, by allowing inmates to avoid administrative redress of their complaints, the Ninth Circuit's decision undermines Congress's goal of minimizing judicial intrusion in prison affairs. *See, e.g.*, 142 Cong. Rec. S3703-01, *S3704

(statement of Sen. Abraham) ("Our proposals will return sanity and State control to our prison systems."); 141 Cong. Rec. S14611-01, *S14626 (statement of Sen. Dole) ("These guidelines will work to restrain liberal Federal judges . . . who have used these complaints to micromanage State and local prison systems."); *Id.* at *S14627 (statement of Sen. Hatch) ("[I]t is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators . . . ."); 141 Cong. Rec. H1472-06, *H1480 (statement of Rep. Canady) ("The bill also provides much needed relief for States dealing with the problem of frivolous litigation by prisoners and unreasonable Federal court intervention in the operation of jails and correctional facilities.").

Concerns about court intrusion in prison affairs are heightened in cases such as this one that involve state penal facilities. "[A]dditional comity considerations obtain in the § 1983 context -- which are not implicated by a Bivens action -- given the strength of the interest that state prisons[] and state courts[] have in resolving complaints filed by state prisoners." *Booth v. Churner*, Nos. 97-7487, 97-7488, 2000 WL 251627, at *8 (3rd Cir. Mar. 7, 2000). "[F]ederalism and efficiency considerations are [also] implicated . . . because of the greater difficulty federal courts may have in interpreting and/or predicting the contours of state law and state administrative regulations and practices." *Id.*

Requiring exhaustion gives prison officials the first opportunity to address inmate grievances, correct possible wrongdoing, and mitigate damages. Providing prison administrators with the ability to resolve problems early and outside the context of litigation advances important governmental interests in curbing frivolous lawsuits, promoting efficient case management, and minimizing judicial intervention in state prison affairs. The Ninth Circuit's interpretation of § 1997e should be reviewed because it undermines these interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 27, 2000.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONROE JONES, **Plaintiff-Appellant,** **v.** **S. H. GARCIA, Deputy Warden; CALIPATRIA STATE PRISON; JOHN DOES 1-10; JANE DOES 1-10,** **Defendants-Appellees.**	**No. 98-55496** **D.C. No. CV-97-62-IEG** **MEMORANDUM**[1]

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted January 18, 2000[2]

Before: BEEZER, O'SCANNLAIN, THOMAS, Circuit Judges.

Monroe Jones, a California state prisoner, appeals pro se the dismissal without prejudice of his 42 U.S.C. § 1983 action against prison officials, seeking damages and injunctive relief

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

based on alleged violations of his constitutional rights. We reverse the district court's dismissal for failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a), and remand.

First, appellees' motion to dismiss this appeal for lack of jurisdiction is denied. The district court's dismissal without prejudice to refiling after exhaustion of administrative remedies did not grant leave to amend and was a final, appealable order. *See National Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433-34 (9th Cir. 1997); *WXM Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

Second, in his reply brief jones waives his claims for injunctive relief.[3] Accordingly, we reverse the dismissal of his claims pursuant to 42 U.S.C. § 1997e(a). *See Rumbles v. Hill*, 182 F.3d 1064, 1066 (9th Cir. 1999) (failure to exhaust administrative remedies does not deprive federal court of subject matter jurisdiction when money damages is sole relief sought and when such a remedy is not available through prison's administrative grievance process), *petition for cert. filed*, 68 U.S.L.W. 3234 (U.S. Sept. 27, 1999) (No. 99-537).

REVERSED and **REMANDED** for further proceedings consistent with this disposition.

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3. Appellant's motion for an extension of time to file reply brief is granted. The reply brief received on March 22, 1999, is ordered filed.

IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF CALIFORNIA

MONROE JONES, **Plaintiff,** **v.** **S.H. GARCIA, Deputy Warden at Calipatria State Prison,** **Defendants.**	**CASE NO. 97-0062 IEG (CGA)** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER 12(b)(6) [Doc. #24]**

BACKGROUND[1]

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1. In his first amended complaint plaintiff fails to specify the factual background which gave rise to the alleged constitutional violations. Instead, plaintiff uses the amended complaint as an opportunity to add additional information to his original complaint, in an effort to correct the defects identified by this Court's July 25, 1997 Order granting defendant's motion to dismiss, without reasserting the information contained within that complaint. As defendant Garcia correctly asserts, an amended pleading completely supersedes any earlier pleading and any claims not raised in within the amended pleading are deemed waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (holding an amended complaint supersedes any earlier complaint and any claims not raised in the amended complaint are deemed waived). Therefore, plaintiff's failure to reallege the relevant facts to support his claims is fatal to this instant complaint. In the interest of affording a pro se litigant in a civil rights case adequate opportunity to correct these deficiencies, however, the Court will discuss the claims raised in the first amended complaint in light of the original complaint's factual background where necessary. This will allow the Court to both (a) coherently discuss the claims raised by the instant complaint and (b) provide plaintiff with guidance in filing any subsequent amended pleadings in the instant case. See Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir 1988) (holding court must construe pleadings liberally and afford

On September 22, 1997, plaintiff, an inmate at Calipatria State Prison ("CSP"), filed a first amended complaint against defendant under 42 U.S.C § 1983 based on alleged violations of plaintiff's constitutional rights.[2] In his amended complaint, plaintiff alleges that his Eighth Amendment rights were violated based on defendant's conduct in (a) placing plaintiff in administrative segregation; (b) faling to protect plaintiff from an inmate attack in administrative segregation; (c) using excessive force to subdue plaintiff in the aftermath of the altercation; and, (d) denying plaintiff access to adequate medical care. Plaintiff also contends that his Fourteenth Amendment rights (a) to Due Process were violated based on his placement in administrative segregation without a hearing,[3] and (b) his Equal Protection rights were violated based on plaintiff's placement in administrative segregation.

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plaintiff benefit of the doubt when appearing pro se in civil rights case).

2. Although plaintiff/s amended complaint only names S. H. Garcia as a defendant, the Court acknowledges that a document entitled "Amended and Supplemental Pleading(s) Pursuant to F.R.C.P. Rule 15" was attached as part of plaintiff's amended complaint. It appears from that supplemental document that plaintiff would like to name Officers Sudue, Huey, Davis and McKenny as defendants under Rule 15. The Court notes that upon filing a second amended complaint, plaintiff may name these officers as defendants in this action. In order to name these officers as defendants, however, plaintiff must identify specific factual allegations linking to these individuals to specific constitutional claims under § 1983. See Ivey v. Board of Regent of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss").

3. Plaintiff also attempted to assert a due process claim based on the loss of his prison job. However, this claim was dismissed with prejudice by the Court's July 25, 1997 order. See Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985) (holding due process claim only cognizable where recognized constitutional interest at stake); Coakley v. Murphy, 884 Ff.2d 1218, 1222 (9th Cir. 1989) (holding that a prisoner has no constitutional right to a work assignment). Therefore, plaintiff cannot reassert that claim in the amended complaint.

In his original complaint, plaintiff alleged that he was falsely accused of being a member/leader of the Black Gorilla Family (BGF), a prison gang. Plaintiff's alleged gang affiliation has resulted, in the past, in his segregation from the general prison population at Folsom State Prison. Original Complaint p. 1, 11.5 - 9; original Complaint Exhibit A.

For the first three weeks upon his arrival at Calipatria, plaintiff was housed in Ad-Seg. Original Complaint p. 1, 11. 10 - 17. In his amended complaint, plaintiff alleges that while he was housed in administrative segregation, plaintiff was assaulted by his cellmate and several correctional officers. Amend. Complaint, p. 2. Plaintiff claims that with the warden watching and plaintiff in handcuffs, correctional officers pepper sprayed plaintiff and beat him with a baton. Amend. Complaint, p.2. Plaintiff further maintains that during his detention in administrative segregation, he was (a) denied medical treatment for the injuries he sustained during the altercation with his cellmate and the correctional officers; (b) denied access to clothing which is available to inmates who are not in administrative segregation; and, (c) denied access to the law library. Amend. Complaint, p. 3.

Defendant now seeks dismissal of the complaint for failure to state a claim under Fed.R.Civ.P. Rule 12(b)(6).

DISCUSSION

A. Legal Standard for Motion to Dismiss Under 12(b)(6)

When ruling on a motion to dismiss, the court must accept all material allegations of fact in the complaint as true and construe those allegations in the light most favorable to the nonmovant. North Star International v. Arizona Corp. Com'n, 720 F.2d 578, 581 (9th Cir. 1983). Unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, a complaint cannot be dismissed for failure to state a claim. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The pleadings need not allege facts

constituting the claim for relief or defense, but only must give fair notice of the pleader's claim or defense so that opposing parties can respond, undertake discovery, and prepare for trial. Id.

Rule 12(b)(6) dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" in the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The court looks not at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Where a plaintiff appears *in propria persona* in a civil rights case, the court must construe the pleadings liberally and afford plaintiff any benefit of the doubt. Karim-Panabi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). In liberally interpreting a pro se civil rights complaint, however, the court may not supply essential elements of a claim that were not initially pleaded. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss," Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Nevertheless, the court must give a pro se litigant leave to amend his complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Noll v. Carlson, 809 F.2d 1446, 1447 (9th Cir. 1987). Thus, before the court may dismiss a pro se civil rights complaint, it must provide the plaintiff with a statement of the complaint's deficiencies. Karim-Panahi, 893 F.2d at 623-24.

B. Analysis: 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. Graham v. Conner, 490 U.S. 386, 393-94 (1989). Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under

color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988); Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, Daniels v. Williams, 474 U.S. 327, 328 (1986).

There appears to be no dispute that the defendant was acting under color of state law when she allegedly deprived plaintiff of his Eighth and Fourteenth Amendment rights. Thus, the Court now proceeds to the merits of plaintiff's § 1983 claims against the defendant.

1. Plaintiff's Eighth Amendment Claims

a. Placement in Ad-Seg Constitutes Cruel and Unusual Punishment

Plaintiff alleges that his three-week placement in Ad-Seg at Calipatria constitutes cruel and unusual punishment, in violation of the Eighth Amendment. Amend. Complaint, p. 2.

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishment." Ingraham v. Wright, 430 U.S. 651, 664 (1977). The Supreme Court has held that a prison official violates the Eighth Amendment when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994). Second, the official must have acted with deliberate indifference to the prisoner's needs. Farmer, 511 U.S. at 834.

The Eighth Amendment is violated with respect to prison conditions and practices when inmates are deprived of the "minimal civilized measure of life's necessities," Hudson v. McMillian, 503 U.S. 1, 9 (1992), "occurring through deliberate indifference by prison personnel or officers." Wilson v. Seiter, 501 U.S. 294, 3022-03 (1991) What the Supreme Court meant

by "minimal civilized measure of life's necessities" received fuller explication in a later opinion:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs- e.g., food, clothing, shelter, medical care and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment.

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 200 (1989).

In an effort to satisfy this test, plaintiff amends his complaint to include general allegations that during his incarceration in administrative segregation, plaintiff was denied access to (a) the law library and (b) the clothing available to inmates in the general population. Amend. Complaint, p. 3.

The Court finds these allegations do not demonstrate that plaintiff was denied the "minimal civilized measure of life's necessities." In other words, plaintiff's alleged deprivations are not, from an objective standpoint, "sufficiently serious" under Farmer v. Brennan, 511 U.S. 825, 834 (1994). With respect to the allegations concerning clothing, plaintiff does not contend that he was denied clothing altogether. Rather, plaintiff alleges he did not have access to the same clothing available to general population inmates. The allegation, therefore, does not indicate that defendant failed to provide for plaintiff's basic needs. With respect to the law library claim, plaintiff fails to allege how he was harmed by his inability to access the law library during this three week confinement in Ad-Seg. See Lewis v. Casey, 116 S.Ct. 2174, 2180 (1996) (holding that prisoner must demonstrate prejudice to legal claims resulting from inadequate access).

Plaintiff also fails to allege that defendant was either (a) personally involved in the alleged wrongdoing or (b)

"deliberately indifferent" to plaintiff's needs. Although plaintiff concluded that these alleged inadequacies in Ad-Seg amounted to deliberate indifference, plaintiff failed to specify how defendant in particular was "deliberately indifferent." See Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982) (holding conclusory allegations insufficient to withstand motion to dismiss). As there is no respondeat superior liability under § 1983,[4] the failure to allege personal acts by the defendant which have a direct causal connection to the constitutional violation at issue warrants dismissal. Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986). Furthermore, plaintiff also fails to include evidence that he has exhausted his administrative appeals as required under 42 U.S. C. § 1997e.[5]

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4. See Palmer v. Sanderson, 9 F.3d 1433, 1437-38 (9th Cir. 1993); see also 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation §§ 3.22-3.23 (3d ed. 1991).

5. Section 1997e(a) provides, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Therefore, defendatn in the instant case must pursue and exhause his administrative remedies within the California Department of Corrections before this lawsuit may move forward.

In California, the administrative appeal system for inmates is decribed in Title 15 of the California Code of Regulations. 'Any inmate or parolee under the [California Department of Correction's] jurisdiction may appeal any department decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." Cal.Code Regs. Tit. 15, § 3084.1(a). In order to exhaust administrative remedies, a prisoner must first attempt to informally resolve the problem with the "staff [member] involved in the action or decision being appealed." Id. § 3084.5(a). If unsuccessful, the prisoner mut then submit a formal appeal on an inmate appeal form (i.e., a CDC 602 form) to the institution's appeals Coordinator or Appeals Office, id. § 3084.5(b), and if unsuccessful there, must submit a formal appeal for second level review, id § 3084.5(c), which is conducted by the institution head or designee. Id. § 3084.5(e)(1). Finally, the prisoner mut submit a formal appeal for third level review to the director of the California Department of Corrections or the director's designee. Id. § 384.5(e)(2).

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon conditions of confinement in Ad-Set. Plaintiff's condition of confinement Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations.[6] Furthermore, any future amended complaint must include all of the relevant factual background, legal claims and request for relief in one document. The Court will not read any future amended complaint in conjunction with the earlier complaints in an effort to ferret out either plaintiff's allegations or claims. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 3373 (9th Cir. 1990).

b. Failure to Protect

In his amended complaint, plaintiff alleges defendant failed to protect him from the inmate attack which occurred while plaintiff was in administrative segregation.

Prison officials may be liable under § 1983 if they fail to protect an attack by one prisoner on another. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988); Berg v. Kincheloe, 794 F.2d 457, 461 (9th Cir. 1986). To state a claim for failure to protect, a plaintiff must allege: 1) that the specific prison official, in acting or failing to act, was deliberately indifferent to the mandates of the Eighth Amendment; and 2) that this indifference was the actual proximate cause of the deprivation of the inmate's right to be free from cruel and unusual punishment. Leer, 844 F.2d at 634. The Supreme Court has

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6. Plaintiff must also include proof of exhaustion in any future complaint by attaching copies of the relevant administrative appeals submissions and orders.

held that, for purposes of failure to protect claims, prison officials must have been aware of a serious risk of harm to the prisoner. Farmer, 511 U.S. at 834.

Plaintiff has failed to allege specific facts demonstrating that defendant acted with "deliberate indifference" to a "serious" risk of harm or that defendant's deliberate indifference was the actual proximate cause of any Eighth Amendment deprivation. Leer, 844 F.2d at 634. Furthermore, plaintiff has failed to demonstrate the exhaustion of administrative remedies under 42 U.S. C § 1997(c).

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim for failure to protect. Plaintiff's failure to protect Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations.[7] Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

c. Excessive Force

In his amended complaint, plaintiff contends that officers used excessive force in responding to fight which took place between plaintiff and an unidentified inmate in administrative segregation. In order to state a claim for excessive force, plaintiff must allege facts which demonstrate that officials used force "maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 503 U.S. 1,4 (1992).

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7. Plaintiff must also include proof of exhaustion in any future complaint by attaching copies of the relevant administrative appeals, submissions, and orders.

Ordinarily, plaintiff's allegations that after being handcuffed and, presumably, placed under control, he was brutalized with a baton and pepper spray would be enough to state a claim. In the instant case, however, plaintiff fails to allege that defendant, the deputy warden at CSP, was personally involved in the alleged wrongdoing.[8] This absence is critical because there is no respondeat superior liability in § 1983 actions. Palmer v. Sanderon, 9 F.3d 1433, 1437-38 (9th Cir. 1993); see also 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation §§ 3.22-3.3.23 (3d ed. 1991). Therefore, the failure to allege personal acts by the defendant which have a direct causal connection to the constitutional violation at issue warrants dismissal. Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986). Plaintiff also fails to include evidence that he has exhausted his administrative appeals as required under 42 U.S.C. § 1997e.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon excessive force. Plaintiff's excessive force claim is **DISMISSED, without prejudice.** Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

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8. The Court has additional concerns about the general nature of these allegations. Plaintiff fails to specify (a) the date or time of the alleged incident; (b) the other inmate involved in the fight; or, (c) the names of the officers involved in the post-fight brutality. However, the Court need not address these issues as plaintiff's failure to allege defendant's personal involvement is dispositive to the instant claim.

d. Access to Adequate Medical Care

Plaintiff also alleges that his Eighth Amendment rights were violated based on defendant's refusal to accord plaintiff adequate medical care following the incident in Ad-Seg. The Eighth Amendment proscribes deliberate indifference to the serious medical needs of prisoners. Estelle v. Gamble, 429 U.S. 97, 104 (1976). In the instant case, however, defendant fails to allege what medical needs he had in the aftermath of the altercation. Therefore, it is impossible to know whether these general medical needs are sufficiently serious. Plaintiff also fails to personally link defendant to the allegations that plaintiff was denied medical care. See Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986) (plaintiff must allege personal acts by defendant which have causal connection to constitutional violation). Furthermore, plaintiff fails to demonstrate that he has exhausted his administrative remedies in pursuit of medical care.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon access to medical care. Plaintiff's medical access Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff must also include copies of the pertinent medical records and/or a declaration describing the efforts plaintiff made to obtain those records if he chooses to present this claim after exhausting his administrative remedies. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). with the

2. Plaintiff's Due Process Claim

Plaintiff contends that his placement in administrative segregation without a hearing was a denial of due process under the Fourteenth Amendment. There is, however, no federally protected right to remain in the general prison population or not to be placed in Ad-Seg. Sandin v. Conner, 115 S.Ct. 2293, 2300 (1995); Hewitt v. Helms, 459 U.S. 460, 468 (1983). The placement of a prisoner in segregation requires due process protections only if two conditions are met: (1) state law creates mandatory rules for deciding when the prisoner shall be placed in or released from segregation; and (2) the segregation is an "atypical and significant hardship" compared to the normal conditions of confinement. Sandin, 115 S.Ct. At 2301 (no "atypical and significant hardship" where plaintiff was placed in disciplinary segregation for 30 days); Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (applying Sandin and finding that due process protections are not required when officials place a prisoner in segregation in a Hawaii state prison for fourteen days).

Here, plaintiff has alleged no specific conduct on the part of the defendant forming the basis of his due process claim. Plaintiff also fails to allege that his three-week placement in Ad-Seg posed an "atypical and significant hardship" compared to the normal conditions of confinement. Nothing in the complaint suggests that his three-week Ad-Seg term, for example, imposed more restricted conditions that the "lockdown" regularly imposed on inmates outside of disciplinary segregation, affected the duration of this sentence, or otherwise worked a major disruption of his environment. Although plaintiff alleges that he was beaten by correctional officers during his period of confinement in administrative segregation, plaintiff does not allege that such conduct was part of the treatment inflicted on all of the prisoners in Ad-Seg. This excessive force claim is a stand-alone issue which does not relate to the general conditions of Ad-Seg. The only conditions which plaintiff associates with confinement in Ad-Seg relate to access to the law library and the clothing available

to Ad-Seg inmates. The Court finds that these allegations fail to demonstrate the kind of "atypical and significant hardship" compared to the normal conditions of confinement which is required under Sandin. See Beverati v. Smith, 120 F.3d 500 (5th Cir. 1997) (holding exposure to Ad-Seg for six month term where Ad-Seg cells infested with vermin and inmates receive less clothing that statutorily accorded does not impose atypical hardship sufficient to implicate Sandin liberty interest).

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's due process claim based upon his placement in Ad-Seg. Plaintiff's due process claim based upon his placement in Ad-Seg is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in his due process claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

3. Plaintiff's Equal Protection Claim

Plaintiff alleges that he was denied equal protection on the basis is his three-week placement in Ad-Seg and the allegations that he is a gang member. Orig. Complaint p. 4, l. 15 - p. 5, l. 3.

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall `deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburn, Tex. V. Cleburne Living Center, 473 U.S. 432, 439 (1985); Shaw v. Reno, 509 U.S. 630 (1993).

Proof of racially discriminatory intent or purpose is required to uphold a racial discrimination claim. Washington v. Davis, 426 U.S. 229, 239-40 (1976). Discriminatory intent

may be proved by direct or circumstantial evidence. Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), *amended on other grounds*, 784 F.2d 1407 (9th Cir. 1986).

Plaintiff fails to allege that he is a member of a protected class. Plaintiff also fails to allege any facts demonstrating that defendant: 1) placed him in Ad-Seg with a discriminatory intent or purpose; 2) brought any false charges against plaintiff with discriminatory intent.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's equal protection claim. Plaintiff's equal protection claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in this claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

CONCLUSION

Based on the aforementioned discussion, the Court **GRANTS** defendant's motion to dismiss under Fed.R.Civ.P. Rule 12(b)(6). **IT IS ORDERED** that:

1. Plaintiff's Eighth Amendment claims based on (a) placement in administrative segregation; (b) failure to protect; (c) excessive force; and, (d) inadequate access to medical care are **DISMISSED, without prejudice**. Plaintiff may not refile until he exhausts his administrative remedies. Furthermore, plaintiff must correct the deficiencies identified in section B(1) of this Order prior to refiling. Failure to address these deficiencies will result in future dismissal of the claim with prejudice.

2. Plaintiff's Due Process claim based on his placement in Ad-Seg without a hearing is **DISMISSED, without prejudice**. Plaintiff may not refile until he exhausts his administrative remedies. Furthermore, plaintiff mut correct the deficiencies identified in section B(2) of this Order prior to refiling. Failure to address these deficiencies will result in future dismissal of the claim with prejudice.

3. Plaintiff's Equal Protection claim based on his placement in Ad-Seg based on his gang affiliation is **DISMISSED, without prejudice**. Plaintiff may not refile until he exhausts his administrative remedies. Furthermore, plaintiff must correct the deficiencies identified in section B(2) of this Order prior to refiling. Failure to address these deficiencies will result in future dismissal of the claim with prejudice.

IT IS SO ORDERED.

DATED: Jan. 6, 1998 /s/Irma E. Gonzalez
IRMA E. GONZALEZ, Judge
United States District Court

cc: All Parties
IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF CALIFORNIA

MONROE JONES, **Plaintiff,** **v.** **S.H. GARCIA,** **Defendants.**	**CASE NO. 97-0062 IEG (CGA)** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER 12(b)(6) [Doc. #4]**

On January 14, 1997, plaintiff Monroe Jones, a state prisoner proceeding pro se and *in forma pauperis*, filed a complaint under 42 U.S.C. § 1983 alleging: 1) cruel and unusual punishment, in violation of the Eighth Amendment, on the basis of: a) placement into administrative segregation (Ad-Seg) at Calipatria State Prison; and b) placement in a cell with an active gang member; 2) denial of due process, in violation of the Fourteenth Amendment, on the basis of: a) placement in Ad-Seg based upon false charges of gang membership; and b) loss of his prison job due to his transfer from one Calipatria facility to another; and 3) denial of equal protection, in violation of the Fourteenth Amendment. Plaintiff also brings claims under 42 U.S.C. §§ 1985 and 1986 for conspiracy as well as state law claims for malicious prosecution, defamation of character, libel, and fraud. Plaintiff names Calipatria Chief Deputy Warden S.H. Garcia as the defendant. Plaintiff seeks compensatory and punitive damages as well as injunctive relief.

Specifically, plaintiff alleges that he has been falsely accused of being a member/leader of the Black Gorilla Family (BGF), a prison gang. Plaintiff's alleged gang affiliation has resulted, in the past, in his segregation from the general prison population at Folsom State Prison. (Complaint, p. 1, II. 5-9; Complaint Exhibit A).

For the first three weeks upon his arrival at Calipatria, plaintiff was housed in Ad-Seg. (Complaint p. 1, II. 10-17). Plaintiff was then released into the general population and housed in "D" Facility. After nine months, plaintiff was transferred to "A" Facility and was removed from his job as a result. (Complaint p. 1, II. 18-23.) At "A" Facility, plaintiff was placed into a cell with "an active crip," an inmate gang member. Plaintiff filed inmate grievances requesting to be housed alone, but his requests were denied. (Complaint p. 1, I. 24 - p. 2, I. 4; Complaint Exhibit A.)

Defendant now moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that plaintiff has failed to exhaust administrative remedies under the Prison Litigation Reform Act and under Rule 12(b)(6) for failure to state a claim. After reviewing the memoranda and declarations filed, the Court finds the matter suitable for decision without oral argument. Local Rule 7.1(d)(1).

DISCUSSION

A. Defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction

1. Legal Standard

Under Rule 12(b)(1), the party invoking the federal jurisdiction, that is, the plaintiff, has the burden of showing that jurisdiction is proper. Thornhill Publishing Co. v. General Tel. & Electronics Corp., 594 F.2d 730 (9th Cir. 1979) (see also Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989)). Unlike motions governed by Rule 12(b)(6), no presumptive truthfulness attaches to plaintiff's allegations when a court considers the merits of jurisdiction. Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884 (3rd Cir. 1977).

2. Analysis

On April 26, 1996, the Prison Litigation Reform Act of 1996 (PLRA), Pub.L. No. 104-134, 110 Stat. 1321-71 (codified as amended at 42 U.S.C. § 1997e), made the exhaustion provisions of § 1997e(a) mandatory, rather than discretionary. Specifically, PLRA § 803(d) provides that an inmate must exhaust available administrative remedies before bringing suit in federal court:

> No action shall be brought with respect to prison conditions under...42 U.S.C. § 1983, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). When exhaustion of administrative remedies is required by a federal statute, the failure to exhaust is a jurisdictional defect and prevents a district court from hearing the claim. Bell v. Calderon, 1996 WL 168564 (N.D. Cal., 1996); Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992) (exhaustion requirement of Federal Tort Claims Act is jurisdictional and may not be waived).

Defendant argues that plaintiff has failed to allege that he has exhausted all levels of prison appeals available to him and that, thus, the Court lacks subject matter jurisdiction over the claims. The Court notes that the PLRA is silent as to when the exhaustion requirement is satisfied – for example, is it sufficient for a plaintiff to have presented his or her claims within the inmate grievance system? Does exhaustion require a decision on plaintiff's claims at the California Department of Corrections (CDC) Director's level? Is exhaustion required for damages claims even though an inmate cannot obtain damages within the inmate grievance system? Furthermore, plaintiff provides evidence that he has presented the facts of his claims to the inmate grievance procedure. Plaintiff alleges that he has filed "two 602 State Appeals, and several Letters of complaints

to the Deputy Warden and the Program sergeant." (Complaint para. II(B), (C).) Plaintiff attaches to the complaint a CDC Memorandum dated December 16, 1996, which indicates that: 1) plaintiff has exhausted CDC administrative remedies with respect to his claims based upon placement in a cell with a gang member; and 2) plaintiff has at least informally presented to the prison his claims based upon false charges of gang membeship and transfer between Calipatria facilities. (Complaint Exhibit A.)

Thus, at this stage in the proceedings, the Court finds that plaintiff's allegations are sufficient to confer subject matter jurisdiction. Defendant's motion to dismiss the complaint under Rule 12(b)(1) is **DENIED**.[1] The Court now proceeds to defendant's motion to dismiss the claims under Rule 12(b)(6).

B. Defendant's Motion to Dismiss Under Rule 12(b)(6)

1. Legal Standard

When ruling on a motion to dismiss, the court must accept all material allegations of fact in the complaint as true and construe those allegations in the light most favorable to the nonmovant. North Star International v. Arizona Corp. Com'n, 720 F.2d 578, 581 (9th Cir. 1983). Unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, a complaint cannot be dismissed for failure to state a claim. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The pleadings need not allege facts constituting the claim for relief or defense, but only must give fair notice of the pleader's claim or defense so that opposing parties can respond, undertake discovery, and prepare for trial. Id.

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1. The Court notes that defendant asks this Court to declare plaintiff a "vexatious litigant." This request is **DENIED** as only the Chief Judge of this District has the power to impose vexatious litigant status. Furthermore, the grounds for sua sponte dismissal under 28 U.S.C. § 1915(g) are more properly addressed at the *in forma pauperis* stage.

Rule 12(b)(6) dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" in the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The court looks not at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Where a plaintiff appears *in propia persona* in a civil rights case, the court must construe the pleadings liberally and afford plaintiff any beenfit of the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). In liberally interpreting a pro se civil rights complaint, however, the court may not supply essential elements of a claim that were not initially pleaded. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Nevertheless, the court must give a prose litigant leave to amend his complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Noll v. Carlson, 809 F.2d 1446, 1447 (9th Cir. 1987). Thus, before the court may dismiss a pro se civil rights complaint, it must provide the plaintiff with a statement of the complaint's deficiencies. Karim-Panahi, 893 F.2d at 623-24.

2. Analysis: 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94 (1989). Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988); Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled

in part on other grounds, Daniels v. Williams, 474 U.S. 327, 328 (1986).

a. Plaintiff's Eighth Amendment Claims

(1) Placement in Ad-Seg Constitutes Cruel and Unusual Punishment

Plaintiff alleges that his three-week placement in Ad-Seg at Calipatria constitutes cruel and unusual punishment, in violation of the Eighth Amendment. (Complaint p. 5, II. 3-6.)

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishment." Ingraham v. Wright, 430 U.S. 651, 664-68 (1977). The Supreme Court has held that a prison official violates the Eighth Amendment when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994). The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." Farmer, 511 U.S. at 834.

The Eighth Amendment is violated with respect to prison conditions and practices when inmates are deprived of the "minimal civilized measure of life's necessities," Hudson v. McMillian, 503 U.S. 1, 9 (1992), "occurring through deliberate indifference by prison personnel or officers," Wilson v. Seiter, 501 U.S. 294, 302-03 (1991). What the Supreme Court meant by "minimal civilized measure of life's necesities" received fuller explication in a later opinion:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment.

DeShaney v. Winnebago County Dept. Of Social Servs., 489 U.S. 189, 200 (1989).

Plaintiff fails to meet this test. Plaintiff has alleged no facts about the conditions of his three-week confinement in Ad-Seg. Plaintiff fails to allege how placement in Ad-Seg deprived him of the "minimal civilized measure of life's necessities" or that the defendant acted with "deliberate indifference." Hudson, 503 U.S. at 9; Wilson, 501 U.S. at 302-03.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon conditions of confinement in Ad-Seg. Plaintiff's conditions of confinement Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

(2) Failure to Protect

Plaintiff alleges that he was "placed into a cell with an active crip" and that his requests to be moved out of the cell were denied. (Complaint p. 1, I.24 - p. 2, I.4.) Plaintiff also alleges that defendant acted with "deliberate indifference" and "reckless disregard for his life, safety..." (Complaint p. 5, II. 25 - 28).

Prison officials may be liable under § 1983 if they fail to protect an attack by one prisoner on another. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988); Berg v. Kincheloe, 794 F.2d 457, 461 (9th Cir. 1986). To state a claim for failure to protect, a plaintiff must allege: 1) that the specific prison official, in acting or failing to act, was deliberately indifferent to the mandates of the Eighth Amendment; and 2) that this indifference was the actual proximate cause of the deprivation of the inmate's right to be free from cruel and unusual punishment. Leer, 844 F.2d at 634. The Supreme Court has

held that, for purposes of failure to protect claims, prison officials must have been aware of a serious risk of harm to the prisoner. Farmer, 511 U.S. at 834.

Here, plaintiff attaches a December 16, 1996 Memorandum from defendant addressing plaintiff's safety concerns and request for a single cell. (Exhibit A.) This suffices to show that defendant was aware that plaintiff believed he was at risk. However, plaintiff has failed to allege specific facts demonstrating that defendant acted with "deliberate indifference" to a "serious" risk of harm or that defendant's deliberate indifference was the actual proximate cause of any Eighth Amendment deprivation. Leer, 844 F.2d at 634. Finally, plaintiff fails to allege that he has suffered any injury as a result of sharing a cell with an alleged gang member.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim for failure to protect. Plaintiff's failure to protect Eighth Amendment claim is **DISMISSED, without prejudice.** Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

b. Plaintiff's Fourteenth Amendment Claims

(1) Denial of Due Process

(a) Placement in Ad-Seg Based Upon False Charges of Gang Membership

Plaintiff alleges that defendant is "making false charges against me...not supported by the records" that he is a gang member. (Complaint para IV.) Plaintiff further alleges that his three-week placement in Ad-Seg was because of the false charges. (Complaint p. 4, II 17 - 21.)

The "filing of unfounded charges [does] not give rise to a per se constitutional violation actionable under section 1983" so long as prison officials provide the inmate with a subsequent hearing meeting minimum due process requirements. Freedman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986), reh'g denied 826 F.2d 194 (2d Cir. 1987), cert denied 485 U.S. 982 (1988). Since Sandin v. Conner, 115 S.Ct. 2293 (1995), federal courts begin the procedural due process analysis not with the "notice and opportunity" requirements outlined in Wolff v. McDonnell, 418 U.S. 539 (1974), but rather by first determining whether a protected liberty interest is at stake.

There is no federally protected right to remain in the general prison population or not to be placed in Ad-Seg. Sandin, 115 S.Ct. at 2300; Hewitt v. Helms, 459 U.S. 460, 468 (1983). The placement of a prisoner in segregation requires due process protections only if two conditions are met: (1) state law creates mandatory rules for deciding when the prisoner shall be placed in or released from segregation; and (2) the segregation is an "atypical and significant hardship" compared to the normal conditions of confinement. Sandin, 115 S.Ct. at 2301 (no "atypical and significant hardship" where plaintiff was placed in disciplinary segregation for 30 days); Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (applying Sandin and finding that due process protections are not required when officials place a prisoner in segregation in a Hawaii state prison for fourteen days). Here, plaintiff has alleged no specific conduct on the part of the defendant forming the basis of his due process claim, with the exception of a December 16, 1996 Memorandum from the defendant to the plaintiff which simply restates the contents of plaintiff's inmate file concerning plaintiff's past gang activities, in response to plaintiff's request for a single cell. Plaintiff also fails to allege that his three-week placement in Ad-Seg possed an "atypical and significant hardship" compared to the normal conditions of confinement. Nothing in the complaint suggests that his three-week Ad-Seg term, for example, imposed more restricted conditions that the "lockdown" regularly imposed on inmates outside of

disciplinary segregation, affected the duration of his sentence, or otherwise worked a major disruption in his environment.

In sum, plaintiff has not alleged: 1) that defendant took any action with respect to his three-week placement in Ad-Seg; or 2) any facts relating to the conditions of his Ad-Seg confinement and comparing them to the conditions in the general population. Therefore, because plaintiff's three-week placement in segregated confinement does not, as pleaded, present the type of atypical, significant deprivation contemplated in Sandin, no process is due plaintiff.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's due process claim based upon his placement in Ad-Seg. Plaintiff's due process claim based upon his placement in Ad-Seg is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in his due process claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

(b) Facility Transfer and Loss of Prison Job

Plaintiff alleges that, nine months after he arrived at Calipatria, he was transferred from "D" Facility to "A" Facility and that he lost his job as a consequence.

"A due process claim is cognizable only if there is a recognized liberty or property interest at stake." Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985). A prisoner has no constitutional right to a work assignment. Coakley v. Murphy, 884 F.2d 1218, 1222 (9th Cir. 1989); Toussaint v. McCarthy, 801 F.2d 1080, 1106-08 (9th Cir. 1986), cert denied 481 U.S. 1069 (1987) ([t]he administration of state-created work programs is the povince of prison officials, not the district court'). Consequently, the termination of plaintiff's job due to his transfer to "A" Facility does not constitute a violation of due process.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's due process claim based upon his work assignment termination. This claim is **DISMISSED, with prejudice.**

(2) Denial of Equal Protection

Plaintiff alleges that he was denied equal protection on the basis of his three-week placement in Ad-Seg and the allegations that he is a gang member. (Complaint p. 4, I. 15 - p. 5, I. 3.)

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall `deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985); Shaw v. Reno, 509 U.S. 630 (1993).

Proof of racially discriminatory intent or purpose is required to uphold a racial discrimination claim. Washington v. Davis, 426 U.S. 229, 239-40 (1976). Discriminatory intent may be proved by direct or circumstantial evidence. Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), *amended on other grounds*, 784 F.2d 1407 (9th Cir. 1986).

Plaintiff fails to allege that he is a member of a protected class. Plaintiff also fails to allege any facts demonstrating that defendant: 1) placed him in Ad-Seg with a discriminatory intent or purpose; 2) brought any false charges against plaintiff with discriminatory intent.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's equal protection claim. Plaintiff's equal protection claim is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in this claim will result in future dismissal of the claim with prejudice.

Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

3. Analysis: Plaintiff's §§ 1985 and 1986 Claims

a. 42 U.S.C. § 1985

42 U.S.C. § 1985 proscribes conspiracies to interfere with civil rights. Plaintiff alleges a violation of § 1985(3), which concerns conspiracies to deprive an individual of "the equal protection of the laws" or "equal privileges and immunities under the laws."[2] A claim brought under section 1985(3) must allege the following elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29 (1983). Furthermore, the complaint must contain an allegation of "racial, or perhaps other class-based, invidioiusly discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (limiting § 1985(3).)

To allege a claim of conspiracy, a plaintiff must allege facts with sufficient particularity to show an agreement or a meeting of the minds to violate the plaintiff's constitutional

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2. "Section 1985 contains three substantive sections. Section 1985(1) concerns preventing an officer of the United States from performing his or her duties. Section 1985(2) concerns conspiracy to obstruct justice in the federal courts or state courts, or to intimidate a witness or juror therewith." Bretz v. Kelman, 773 F.2d 1026, 1027 n.3 (9th Cir. 1985).

rights. Woodrum v. Woodward County, Okl., 866 F.2d 1121, 1126 (9th Cir. 1989). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey, 673 F.2d at 268; Aldabe v. Aldabe, 616 F.2d at 1092 (conclusory allegations of conspiracy insufficient to support a claim under § 1985).

Plaintiff does not allege any facts in support of his conclusory allegation that defendant's actions constitute "conspiracy to illegally charge me for being in an alleged gang." (Complaint para. IV; p. 4, II l - 4.) Plaintiff has also failed to allege an agreement or meeting of the minds on the part of the defendant with any other individual to violate plaintiff's constitutional rights. "A claim under this section must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient to support a claim." Karim-Panahi, 839 F.2d at 626. Thus, plaintiff's § 1985(3) claim fails.

The Court **GRANTS** defendant's motion to dismiss plaintiff's § 1985(3) claim. Plaintiff's § 1985(3) claim is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in his § 1985(3) claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

b. 42 U.S.C. § 1986

42 U.S.C. § 1986 provides a cause of action for neglect to prevent a conspiracy to violate constitutional rights. As such, a claim under § 1986 is derivative of a claim under § 1985. Without a violation of the latter, there can be no violation of the former. McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (1990), cert denied 504 U.S. 957 (1992) ("a claim can be stated under § 1986 only if the complaint contains a valid claim under § 1985.")

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's § 1986 claim. Plaintiff's § 1986 claim is

DISMISSED, without prejudice. Plaintiff's failure to address the pleading deficiencies in his § 1986 claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

C. Supplemental Jurisdiction Over Plaintiff's State Law Claims

Generally, dismissal of federal claims before trial dictates that the pendent state law claims should also be dismissed. 28 U.S.C. § 1367(d); Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985). Because the Court has granted defendant's motion to dismiss all the federal claims originally joined with plaintiff's state law claims, the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims. Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's state law claims for malicious prosecution, defamation of character, libel, and fraud. Plaintiff's state law claims are **DISMISSED, without prejudice.**

D. Conclusion

The Court **GRANTS** defendant's motion to dismiss the claims under Rule 12(b)(6):

a) The Eighth Amendment claims based upon conditions of confinement and failure to protect are **DISMISSED, without prejudice**. Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to these claims.

b) The due process claim based upon plaintiff's placement in Ad-Seg is **DISMISSED, without prejudice.** Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to this claim. The due process claim based upon plaintiff's loss of his work assignment is **DISMISSED, with prejudice.**

c) The equal protection claim is **DISMISSED, without prejudice.** Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to this claim.

d) The §§ 1985 and 1986 claims are **DISMISSED, without prejudice.** Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to these claims.

e) The state law claims are **DISMISSED, without prejudice.**

IT IS SO ORDERED.

DATED: July 25, 1997 /s/Irma E. Gonzalez
IRMA E. GONZALEZ, Judge
United States District Court

Supreme Court, U.S.
FILED
JUN 29 2000
CLERK

(2)

No. 99-1730

In the Supreme Court of the United States

SILVIA H. GARCIA,

Petitioner,

v.

MONROE JONES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF 37 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Are prisoners required by 42 U.S.C. 1997e(a), as amended by the Prison Litigation Reform Act, to exhaust administrative remedies before filing suit for damages?

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STATEMENT OF *AMICI* INTEREST

California's petition implicates the continuing viability of one of the States' key tools for managing their prisons and jails – inmate grievance systems and similar dispute resolution programs. The decision below diminishes the effectiveness of those systems by allowing prisoners to "make a federal case" out of routine disputes with correctional officials, and in the process, deprives the States of the opportunity to resolve inmates' concerns internally – before litigation.

Those dispute resolution systems serve a vital function in the States' management of their growing prison and jail populations, providing an inexpensive and effective way for dissatisfied prisoners to point out internal practices that may need improvement. "For the prison administrator[,] this involves *using* the system beyond its day-to-day effects: periodically reviewing the grievances to identify patterns, to anticipate problems, and to formulate policies and procedures that respond to them." S. Brakel, Administrative Justice In The Penitentiary: A Report on Inmate Grievance Procedures, 1982 Am. Bar Founda. Res. J. 111, 129 (1982) (emphasis in original). Indeed, that vital impetus for self-correction was a primary reason that grievance systems were initially implemented. V. McArthur, *Inmate Grievance Mechanisms: A Survey of 209 American Prisons*, 38 Federal Probation 41, 44 (Dec. 1974).

Those systems have the additional benefit of resolving disputes that would otherwise end up in court. They are quite effective in that regard, with studies indicating that a substantial number of inmate complaints lead to modifications of official policy. *Managers Need Comprehensive Systems for Assessing Effectiveness and Operation of Inmate Grievance Mechanisms* (General Accounting Office, Oct. 17, 1977) 2-3. Those grievance-

prompted changes avert many lawsuits that would otherwise "require defendants and other staff members to put in long hours conferring with counsel, answering interrogatories, giving depositions, preparing for trial, 'managing' the press and testifying at trial. Many non-frivolous suits concern small monetary sums, and the time devoted to them by administrators is disproportionate to the amounts involved." G. Cole, R. Hanson, and J. Gilbert, *Alternative Dispute-Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation*, (National Institute of Corrections, U. S. Dept. of Justice 1984) 5-6.

Moreover, internal resolution of grievances costs much less than litigation. Although it costs States an average of between $1,200 and $1,500 to litigate a prisoner's grievance, resolving the same grievance through administrative proceedings costs an average of $166. G. Cole, and J. Gilbert, *Alternate Dispute Resolution Mechanisms for Prisoner Grievances*, 9 Just. Sys. J. 306, 308 n.1, 315 (1984).

Congress understood the importance of those functions when, in 1996, it passed the Prison Litigation Reform Act ("PLRA"), modifying 42 U.S.C. 1997e(a) to mandate exhaustion of administrative remedies before a prisoner sues. The decision below ignores Congress's intent, reimposing the high operational and legal costs that the PLRA was designed to limit. That decision is wrong, and left undisturbed, it and others like it will exact a costly toll of both time and money from States, which will be forced once more to battle in federal court about issues that often can be resolved much more efficiently through grievance programs. The States have a vital interest in seeing that the congressional intent embodied in the PLRA is carried out by the courts, and therefore urge the Court to review the judgment below.

REASONS FOR GRANTING THE WRIT

Two compelling reasons support certiorari: (1) the importance of the question presented to day-to-day prison operations; and (2) the great uncertainty that conflicting circuit court opinions have created for both State officials and for the lower federal courts.

I. The Question Presented Is Critically Important To The Nation's More Than 4,372 Prisons And Jails.

The problems facing our prisons and jails "are complex and intractable . . . requir[ing] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of" corrections professionals. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). The decision below, and others like it in jurisdictions containing some of the nation's largest prisons and jails, greatly complicates that task.

State and local governments now operate at least 4,372 prisons and jails. Criminal Justice Institute, Inc., *The Corrections Yearbook—1998*, 67 (1999); K. Maguire & A. Pastore, *Sourcebook of Criminal Justice Statistics 1996*. Because inmate grievance systems provide valuable operational data and resolve significant numbers of disputes, all but two States have established some type of inmate grievance system. Broad coverage has long been a key design principle for such systems because, as the General Accounting Office has recognized, a grievance system "must be applicable to as broad a range of issues as possible" to be effective. *Grievance Mechanisms in State Correctional Institutions and Large City Jails* (General Accounting Office, June 17, 1977) at 2.

The decision below encourages exactly the opposite result. It holds that prisoners may ignore administrative

remedies whenever they seek damages that are not available through grievance systems. That reading of § 1997e(a) creates an exception that effectively abrogates the statute's general rule, because almost all prisoners seek damages, and no State except Louisiana has a grievance system that authorizes damages for anything other than the loss of personal property. Similar precedents control in the Fifth and Tenth Circuits, which together with the Ninth Circuit, contain some of the largest prison and jail systems in the country. *See Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997); *The Corrections Yearbook—1998*, 2, 210.

That interpretation of § 1997e(a) in those circuits will have palpable effects inside prison walls, undermining the effectiveness of administrative dispute resolution systems where they are needed most:

> *[If] a prisoner may circumvent state agencies by bringing a section 1983 action, corrections personnel may not become aware of, and hence may not be able to rectify, administrative deficiencies* until federal litigation is commenced. . . . Rather than have state policymakers determine the appropriate reform, the federal judiciary interposes its own judgment.
>
> * * *
>
> *Although this might benefit the individual prisoner bringing the action, problems affecting the entire prison population may remain unresolved.*

S. Russo, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the*

Availability of Adequate State Remedies, 7 Seton Hall L. Rev. 366, 392 and n.148 (1976) (emphasis added). The PLRA sought to eliminate that problem, but the perpetuation of the pre-PLRA approach, exemplified by the decision below, could not have come at a worse time, for the States' prison systems are facing ever-more-challenging burdens as their populations continue to grow.

Corrections officials face significant new challenges in housing mentally ill prisoners, prompting unprecedented, and still evolving, changes to operating procedures. H. Steadman & B. Veysey, *Providing Services for Jail Inmates with Mental Disorders* (National Institute of Justice, U. S. Dept. of Justice 1997); P. Rubin & S. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections* (National Institute of Justice, U. S. Dept. of Justice 1995); F. Cohen, *Disciplinary Proceedings and Mental Illness*, 4(4) Corrections Managers' Report 3 (American Correctional Association 1998). At the same time, the prison population now includes more elderly inmates and more young offenders, and both groups need special accommodations. S. Sampson, *Project for Older Prisoners*, 1(2) Corrections Managers' Report 11 (1995); E. Loughran, *Statistics, Predictions and Reality: How Do We Make Sense of Changing Juvenile Crime?* 1(1) Corrections Management Quarterly 67, 70-71 (1997).

Last, but by no means least, there has been a "massive expansion of the female inmate population," raising such unique challenges as pregnancy and child care issues, the difficulties inherent in cross-gender supervision, and the need for a distinct custodial atmosphere. M. Fleisher, R. Rison & D. Helman, *Female Inmates: A Growing Constituency in the Federal Bureau of Prisons*, 1(4) Corrections Management Quarterly 28, 29 (1997); M. Morash, T. Bynum & B. Koons, *Women Offenders: Programming Needs and Promising Approaches*, (National Institute of Justice, U. S. Dept. of

Justice 1998); C. Stewart, *Management Response to Sexual Misconduct Between Staff and Inmates*, 2(2) Corrections Management Quarterly 81 (1998).

The combined effect of those changes has been to put new stresses on correctional systems. The States must cope with novel challenges affecting unprecedented numbers of prisoners, and they must do so with growing numbers of new staff. *The Corrections Yearbook—1998*, 142 (51,841 new correctional employees were hired in 1997). Although they conscientiously try to, and usually succeed in, meeting those challenges, shortfalls are inevitable. Grievance systems provide invaluable data about the nature and potential solutions for the resulting problems. The decision below and others like it deprive officials of that information, encouraging wasteful litigation instead of practical solutions. That may benefit individual plaintiffs, but in the end, it hurts far more prisoners.

Further, the approach adopted below increases the burden of litigation. Many matters that would otherwise be resolved internally will go directly to the federal courts. Federalizing those disputes requires the diversion of scarce State resources because "during the course of litigation, administrators and other corrections personnel may be called as witnesses or be named as parties to the proceedings. As a consequence, these individuals are diverted from their managerial and supervisory functions. The result is a less efficient institutional operation." S. Russo, *supra*, at 393. *See also* G. Cole, R. Hanson & J. Gilbert, *supra* at 5-6 (emphasis added). Although the number of prisoner suits has declined since the passage of the PLRA, their burden is still substantial and is likely to increase if the gatekeeping function of § 1997e(a) can be sidestepped with a simple demand for damages. Indeed, the record here and elsewhere shows that inmates have already discovered that way around the PLRA. Pet. App. at 2a (prisoner dropped claim for

injunctive relief in response to exhaustion defense); *Whitley v. Hunt*, 158 F.3d 882, 884 (5th Cir. 1998) (same).

In sum, the Ninth Circuit's decision and similar decisions elsewhere will make it harder for corrections officials to deal with day-to-day operational problems. Instead, resolution of those problems will become the business of the federal courts, which "are not equipped by experience or otherwise to 'second guess' the decisions of . . . [prison and jail] administrators." *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 133, 137 (1977) (Burger, C. J., concurring). That hardly "reflects the . . . healthy sense of realism" that recognizes "that needed reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field – prison administrators themselves." *Id.* This significant impact on State and local prison and jail operations shows why this case merits review, even apart from the clear circuit split on the question.

II. The Question Presented Is Consuming An Inordinate Amount Of Judicial Resources.

The sharp split among the circuits has created great uncertainty not only for the nation's prison administrators, but for lower federal courts, which must apply the statute's language to literally thousands of cases every year. Three circuits have squarely held that inmates need not pursue relief through prison grievance systems if those administrative channels do not offer money damages to the inmates. *See Whitley v. Hunt*, 158 F.3d 882, 885-887 (5th Cir. 1998); *Rumbles v. Hill*, 182 F.3d 1064, 1068-69 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 787 (2000); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997). Two other circuits have reached the opposite conclusion. *See Wyatt v. Leonard*, 193 F.3d 876, 878-79 (6th Cir. 1999); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 537-38 (7th Cir. 1999). An

additional two circuits have held that prisoners seeking both damages and injunctive relief must first pursue their claims through available prison grievance systems, even if those administrative channels offer only injunctive remedies. *Nyhuis v. Reno*, 204 F.3d 65, 67 (3rd Cir. 2000); *Alexander v. Hawk*, 159 F.3d 1321, 1325-1328 (11th Cir. 1998). And district courts in the circuits where the issue remains unresolved have likewise wrestled with the question. *See, e.g., Smith v. Stubblefield*, 30 F. Supp. 2d 1168, 1173-74 (E.D. Mo. 1998) (requiring exhaustion of administrative remedies); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884 (S.D.N.Y. 1998) (same); *Langford v. Couch*, 50 F. Supp.2d 544, 548 (E.D. Va. 1999) (same).

"Determining the proper scope of the exhaustion requirement in § 1997e will significantly affect the dockets" of federal courts. *Wright v. Hollingsworth*, 201 F.3d 663, 666 (5th Cir. 2000). Although other provisions of the PLRA have reduced the number of prisoner cases in the federal courts, many thousands of new cases are filed every year. Indeed, more than 25,000 new prisoner cases were filed in 1999, while more than 17,000 prisoner filings burdened the courts of appeals. L. Meachem, *Judicial Business of the United States Courts: 1999 Report of the Director* (Administrative Office of the United States Courts, 1999). The Ninth Circuit's decision – and others like it – will frustrate Congress's efforts to channel inmate grievances away from overloaded federal courts. The uncertainty generated by the differing circuit-court opinions on this issue of great importance to the States shows that guidance from this Court is needed now.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the writ.

Respectfully submitted,

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June 2000

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No. 99-1730

In the Supreme Court of the United States

SILVIA H. GARCIA, *Petitioner*

v.

MONROE JONES, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court erred in dismissing respondent's claims for damages under 42 U.S.C. § 1997e(a).

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BRIEF IN OPPOSITION

Petitioner Sylvia Garcia, the Chief Deputy Warden of Calipatria State Prison in California, asks this Court to review an unpublished, unanimous opinion of the Ninth Circuit that is four paragraphs long. Pet. App. 1a-2a. According to petitioner, the decision below warrants an expenditure of this Court's scarce resources because it answers an important question of federal law incorrectly and conflicts with the decisions of other circuits. As explained below, the intercircuit conflict claimed by petitioner is vastly overstated; the precise issue set forth in the petition appears to arise infrequently (as demonstrated by the fact that the majority of circuits have yet to resolve it squarely even though more than four years have elapsed since the passage of the Prison Litigation Reform Act); and the decision below is manifestly correct. For all of these reasons, and because this case is any event a very poor vehicle for resolving the issue raised in the petition, review should be denied.

STATEMENT

1. Respondent Monroe Jones is a state prisoner who is currently incarcerated in Salinas Valley State Prison, in Soledad, California.[1] In January 1997, while incarcerated at another facility in the California system (Calipatria State Prison), Mr. Jones filed an action under 42 U.S.C. §§ 1983, 1985 and 1986 against petitioner Garcia, who is Calipatria's Chief Deputy Warden, and against "John and Jane Does

[1] The petition incorrectly states that Mr. Jones is still incarcerated at Calipatria State Prison. Pet. 3.

One Through Ten," naming all defendants in their official as well as their individual capacities. Pet. ii; Pet. App. 18a-19a, 29a-30a; Pet. C.A. Excerpt of Record ("C.A. ER") 1, 3. In his pro se complaint, Jones advanced a variety of federal constitutional claims and pendent state-law claims, all of which arose out of events that occurred at Calipatria following his transfer there in September 1995 from a third California facility, Folsom State Prison. See C.A. ER 1-12.

According to Mr. Jones's original complaint, while at Folsom he had been confined to administrative segregation for approximately nine months for allegedly belonging to a prison gang. C.A. ER 4. This punishment was based on confidential statements made to prison authorities by other inmates. *Ibid.* Jones has continuously and vigorously disclaimed membership in the gang and, before he left Folsom, that facility's Institutional Gang Coordinator certified that he was not a gang member. *Ibid.* Nonetheless, when Jones arrived at Calipatria, he was summarily placed in administrative segregation where he remained for three weeks. *Ibid.* The Institutional Gang Coordinator at Calipatria subsequently cleared Mr. Jones of any gang activity.

Respondent was then released into the general prison population and he was housed in "D" Facility. C.A. ER 4. Nine months later, however, he was transferred from "D" Facility to "A" Facility and was removed from his job as a result. *Ibid.* In "A" Facility, Jones was placed in a cell with a gang member. *Id.* at 4-5. He tried to resolve the matter informally by talking to prison officers but, when these efforts

proved unsuccessful, he filed a complaint with petitioner Garcia, the Deputy Warden. *Id.* at 5. In a letter dated December 16, 1996, petitioner Garcia denied Jones's request for single-cell status on the ground that it was a "duplicate request," the previous request had been denied administratively, and "this decision exhausted the Administrative remedy available to you within the Department of Corrections." *Id.* at 11. Ms. Garcia also explained that Jones's transfer from "D" Facility to "A" Facility was "due to a program realignment of the facilities and was not adverse." *Ibid.* Finally, Garcia indicated that based upon her review of Mr. Jones's file, she was rejecting his "claims of '[i]ncompatibility' and life being in jeopardy" stemming from his placement in a cell with a gang member. *Ibid.*

In his original complaint, Jones alleged among other things (1) cruel and unusual punishment in violation of the Eighth Amendment, on the basis of his placement in administrative segregation as well as in a cell with a gang member; (2) denial of due process in violation of the Fourteenth Amendment, on the basis of his (a) placement in administrative segregation in reliance upon false charges of gang membership, and (b) loss of his prison job due to his transfer from "D" Facility to "A" Facility; and (3) denial of equal protection, in violation of the Fourteenth Amendment. C.A. ER 7-8;

Pet. App. 18a. Jones sought compensatory and punitive damages as well as injunctive relief. *Ibid.*[2]

2. Garcia moved for dismissal on two grounds: the complaint failed to state a valid claim, and Jones had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e. Amended by a provision of the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321-71, Section 1997e provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

The district court granted Garcia's motion to dismiss for failure to state a claim but — significantly — denied her motion to dismiss based on Jones's failure to exhaust prison grievance procedures. Pet. App. 18a-32a. In rejecting Garcia's exhaustion argument, the district court explained:

> [T]he PLRA is silent as to when the exhaustion requirement is satisfied — for example, is it sufficient for a plaintiff to have presented his or her claims within the inmate grievance system? Does exhaustion require a decision on plaintiff's claims at the California Department of Corrections (CDC) Director's level? Is exhaustion required for damages claims even though an inmate cannot obtain damages within the inmate grievance system? Furthermore, plaintiff provides

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[2] The standard complaint form filled out by Jones included various questions concerning what steps were taken by the inmate to secure relief through the prison grievance procedure. See C.A. ER 2. In answer to these questions, Jones indicated that he had filed several written complaints (known as "Form 602"s) under the California Department of Corrections ("CDC") grievance procedure and had written letters of complaint to Deputy Warden Garcia, Warden Prunty, and a prison sergeant. *Ibid.*

> evidence that he has presented the facts of his claims to the inmate grievance procedure. Plaintiff alleges that he has filed "two 602 State Appeals, and several Letters of complaints to the Deputy Warden and the Program Sergeant." (Complaint para. II(B), (C).) Plaintiff attaches to the complaint a CDC Memorandum dated December 16, 1996, which indicates that: 1) plaintiff has exhausted CDC administrative remedies with respect to his claims based upon placement in a cell with a gang member; and 2) plaintiff has at least informally presented to the prison his claims based upon false charges of gang membership and transfer between Calipatria facilities. (Complaint Exhibit A.)

Id. at 20a-21a. On the basis of this reasoning, the district court concluded that "at this stage in the proceedings" Mr. Jones's complaint should not be dismissed for failure to exhaust the prison grievance procedures. *Id.* at 21a. The court granted Jones 45 days in which to file an amended complaint that would state a proper claim for relief. *Id.* at 31a-32a.

3. On September 23, 1997, Jones filed an amended complaint. C.A. ER 29-39. As the district court noted, Jones "use[d] the amended complaint as an opportunity to add additional information to his original complaint, in an effort to correct the defects identified by this Court's July 25, 1997 Order granting defendant's motion to dismiss, without reasserting the information contained within [the original] complaint." Pet. App. 3a n.1. In expanding upon the Eighth Amendment allegations of the original complaint, Jones claimed that during his three-week stay in administrative segregation, he was assaulted by his cell mate at a time respondent was handcuffed while several correctional officers looked on. C.A. ER 30-31, 33-34. Jones also alleged that as he remained handcuffed and as the warden looked on, several correctional officers,

pepper-sprayed him, struck him "twenty times at leas[t]" with a baton, and dragged him into another cell. *Id.* at 30-31, 34. Jones further alleged that he was denied adequate medical attention for his injuries, denied the food and clothing normally available to the inmates, denied access to his property, and denied access to the law library. *Id.* at 31. Finally, he alleged in the amended complaint that "all administrative remedies[] were exhausted" with respect to his Eighth Amendment claims. *Ibid.*

Garcia again moved to dismiss the complaint for failure to state a valid claim. Pet. App. 5a. In support of that motion, she also pointed to "new allegations" in the amended complaint and argued that, "if the Court interprets these new allegations to be separate 'stand alone' claims, they must be dismissed as [Jones] has not alleged in his amended complaint that he has exhausted his administrative remedies *as to each and every new allegation*." Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, at 16-17 (filed on October 22, 1997) (emphasis added). Garcia acknowledged that the district court, in rejecting a similar argument with respect to the original complaint, had relied on the fact that Jones "alleged that [he] had filed two CDC 602's." *Id.* at 17 n.9. But Garcia suggested that the situation had changed because Jones had "not alleged in the amended complaint that he has even attempted to exhaust his administrative remedies with regard to the newly alleged assault and denial of medical treatment (and other allegations)." *Ibid.* Thus, Garcia in

essence faulted Jones's allegation in the amended complaint that he had exhausted "all administrative remedies[]" (C.A. ER 31) as being too general in nature. Garcia noted as well that "since the type of relief sought by [Jones] is unknown, administrative remedies cannot be said to be inapplicable." Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint, at 17 n.9.

In an unpublished decision, the district court dismissed the amended complaint for failure to state a valid claim. Pet. App. 3a-17a. As an initial matter, the court explained that because "an amended pleading completely supersedes any earlier pleading," Jones's failure in the amended complaint to "reallege the relevant facts to support his claims" in the original complaint was "fatal to this instant complaint." *Id.* at 3a n.1. Nevertheless, the court proceeded to discuss the claims in both documents "[i]n the interest of affording a pro se litigant in a civil rights case adequate opportunity to correct these deficiencies." *Ibid.*[3] Examining each of Jones's claims in turn, the court concluded that — for a variety of reasons — none stated a valid claim for relief. *Id.* at 6a- 17a. With respect to each claim, the district court also faulted Jones for "fail[ing] to include *evidence*" with the amended complaint that would show "that he has exhausted his administrative appeals as required under 42 U.S.C. § 1997e." *Id.* at

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[3] The district court also noted that respondent had sought to amend his complaint to name four more defendants (officers Sudue, Huey, Davis and McKenny) in addition to Chief Deputy Warden Garcia. Pet. App. 4a n.2. The court indicated that "upon filing a second amended complaint, plaintiff may name these officers as defendants in this action." *Ibid.*

9a (emphasis added); see also *id.* at 10a & n.6 (stating that respondent "must also include *proof* of exhaustion in any future complaint by attaching copies of the relevant administrative appeals submissions and orders") (emphasis added); *id.* at 11a & n.7, 12a, 13a, 15a, 16a (same).

4. Jones appealed to the Ninth Circuit. The form that he used as the basis for his handwritten opening brief included the question whether Jones had "exhaust[ed] all administrative remedies for each claim prior to filing [his] complaint in the district court"; Jones replied, "Yes, they were filed by 602 all the way to Sacramento, final disposition." Resp. C.A. Br. 5 (emphasis omitted).

In response, Garcia contended that the district court was correct to dismiss for failure to exhaust on the ground that Jones had failed to provide "'proof of exhaustion * * * by attaching copies of the relevant administrative appeals submissions and orders.'" Pet. C.A. Br. 13 (quoting Pet. App. 10 n.6). In a footnote, Garcia acknowledged the Ninth Circuit's decision in *Lunsford* v. *Jumao-As*, 155 F.3d 1178 (1998), which held Section 1997e does not require a federal prisoner with a damages-only claim in a *Bivens* action to exhaust administrative grievance procedures that do not include a damage remedy, but distinguished *Lunsford* on the ground that Jones was "seek[ing] both injunctive relief and damages." Pet. C.A. Br. 11 n.3.

In his reply brief, Jones indicated that he had been transferred from Calipatria State Prison to Corcoran State Prison and from there to Salinas Valley State Prison.

Resp. C.A. Reply Br. 1. Jones argued that because Salinas Valley State Prison lacked the authority to grant any administrative relief concerning conditions in Calipatria, there was "no longer any [i]njunctive relief[] to be received that could be exhausted by the administrative remedies," and he now had "only * * * a [d]amage [c]laim against Garcia." *Id.* at 3.

5. In an unpublished decision, a panel of the Ninth Circuit unanimously reversed the dismissal order. Pet. App. 1a-2a. The panel noted that while Jones's complaint sought both damages and injunctive relief, he had "waive[d] his claims for injunctive relief" in his reply brief on appeal. *Id.* at 2a. Citing *Rumbles* v. *Hill*, 182 F.3d 1064 (9th Cir. 1999), cert. denied, 120 S. Ct. 787 (2000), which "extended *Lunsford* to section 1983 actions" (*id.* at 1068) and which held that Section 1997e(a) "does not deprive federal court[s] of subject matter jurisdiction when money damages is the sole relief sought and when such a remedy is not available through [a] prison's administrative grievance process" (Pet. App. 2a), the panel reversed the trial court's dismissal order and remanded "for further proceedings consistent with this disposition." *Ibid.* The panel's decision was filed on February 2, 2000, and the mandate issued from the Ninth Circuit on February 24. Garcia did not seek panel or en banc rehearing in the Ninth Circuit.

6. On remand from the Ninth Circuit, the district court, in an order filed on March 23, 2000, noted that its previous dismissal of the complaint had rested not only

on Jones's failure to exhaust all administrative remedies but also on his failure to plead sufficient facts to make out his various Section 1983 claims. To address the latter deficiency, the district court granted Jones leave to file a second amended complaint and directed him to do so within 45 days. The district court warned that if Jones failed to file an amended complaint within 45 days, "his case *will be terminated* without further warning." 3/23/00 Order, at 4 (emphasis in original).

7. On April 3, 2000, petitioner Garcia filed a motion asking the Ninth Circuit to recall the mandate and stay its enforcement. Petitioner indicated that she would be filing a petition for certiorari and argued for the first time (in language closely paralleling that in her cert. petition) that there was a conflict in the circuits and that the Ninth Circuit's unpublished decision ignored the statute's language and legislative history. On April 20, 2000, the Ninth Circuit panel summarily rejected these arguments and denied petitioner's motion for recall of the mandate and for a stay. Shortly thereafter, on April 28, the petition for certiorari was filed in this case.

8. On May 11, 2000, petitioner filed a motion in the district court asking it to stay all proceedings as well as to grant *respondent* an extension of time in which to file a second amended complaint beyond the 45 days specified in the March 23 order. In support of that motion, petitioner filed a declaration of her counsel, Deputy Attorney General James M. Humes (counsel of record for petitioner in this case), in which Mr. Humes explained that a petition for certiorari had been filed and expressed concern that

"if the proceedings in [the district court] were to proceed in an unnecessarily hurried manner," the "issue sought to be reviewed in the Supreme Court * * * could become moot and evade review." 5/4/00 Decl. of James M. Humes (filed on May 11, 2000), at 3. In support of his request that Mr. Jones be granted an extension of time, Mr. Humes noted that Jones had been moved to another facility, the Salinas Valley State Prison, and had not received the district court's March 23 order. *Ibid.*

9. On May 11, 2000, the district court issued an order taking note of petitioner's argument about the pendency of her petition for certiorari in this case and the asserted need "to preserve the existence of a justiciable case or controversy under Article III," and granting Mr. Jones until July 3, 2000 to file an amended complaint. The district court again warned Jones, who is proceeding pro se in that forum, that "his case will be *terminated* without further warning" if he fails to file a second amended complaint. 5/11/00 Order, at 3 (emphasis in original). The district court also directed petitioner to "submit supplemental briefing on the issue of why this Court has jurisdiction to stay the instant proceedings pending Supreme Court review." *Ibid.* After petitioner filed a supplemental brief arguing that the district court should exercise its "inherent" power to stay the proceedings to "ensure[] the justiciability of the petition for certiorari," Mr. Jones filed an opposing brief in which he indicated that he did not intend to file an amended complaint in this case. Defendant's Supplemental Briefing

Re: Jurisdiction to Stay Proceedings, at 2, 4 (filed on May 30, 2000); Plaintiff's Opposition, at 1 (filed on June 15, 2000).

REASONS FOR DENYING THE PETITION

As the foregoing procedural history makes clear, this case is a singularly inappropriate vehicle for resolving the question presented in the petition for certiorari. Not only is there a substantial risk (which petitioner has acknowledged in the lower court) that this case may become nonjusticiable, but also it is far from clear that the outcome would be any different even if petitioner were to prevail in this Court (because respondent clearly *alleged*, in his complaint, that he had exhausted all administrative remedies; and the trial court ordered his complaint dismissed only because it erroneously required him to *prove*, through the submission of documentary evidence, that this allegation was true). Moreover, petitioner never sought panel or en banc rehearing in the Ninth Circuit and indeed presented her interpretation of Section 1997e for the very first time below in a motion to recall the mandate filed approximately two months *after* the court of appeals issued its decision. This Court ordinarily does not entertain arguments never presented in a timely fashion to the lower courts.

Even if these glaring vehicle problems were not present, this case would not warrant this Court's review. To begin with, the intercircuit conflict claimed by petitioner is exceedingly weak. At a minimum, this Court should allow further percolation of the issue so that the lower courts can shed further light on the meaning of

Section 1997e (and perhaps resolve any tension in the circuits' positions through en banc proceedings). What is more, the precise issue set forth in the petition appears to arise infrequently (as demonstrated by the fact that most of the circuits have yet to resolve it even though more than four years have elapsed since the passage of the Prison Litigation Reform Act). And finally, review should be denied because the decision below is manifestly correct.

I. This Case Is An Inappropriate Vehicle For Resolving The Question Presented.

For at least three independent reasons, this case is an exceedingly poor vehicle for resolving the question presented in the petition for certiorari. Even if this case satisfied all of the Court's traditional critieria of certworthiness (which it does not), review should be denied on this ground.

a. Most obviously, there is a substantial possibility that this case will become moot in the near future. As explained above, the Ninth Circuit's mandate has already issued and the district court, on remand, has clearly indicated — twice — that unless respondent files an amended complaint that meets the court's satisfaction, it will dismiss this case. As petitioner has admitted in multiple submissions in the lower courts, that result would effectively moot the case in this Court.

Nor is the possibility of such a dismissal hypothetical or remote. The district court has twice dismissed respondent's complaint for failure to state a valid claim. On

remand from the decision petitioner seeks to have this Court review, the trial court indicated that its prior order rested as well on repondent's failure to state a valid claim. Moreover, respondent (who is proceeding pro se in the trial court) has indicated that he does not intend to file another amended complaint. And while petitioner has asked that the trial court invoke its "inherent" power to keep the case alive in this Court, the district court has expressed uncertainty about its own authority to stay the proceedings before it. Under these circumstances, there is a substantial possibility that this case will become moot sometime in the future. For that reason alone, review should be denied.

b. Equally problematic is the fact that petitioner never suggested, in the lower courts, that 42 U.S.C. § 1997e abolishes the traditional futility exception to the exhaustion doctrine and requires a prisoner to engage in the exercise of resorting to all levels of a prison grievance procedure even though it is a complete waste of time to do so. The first time petitioner even hinted at this remarkable interpretation was after the briefing in the court of appeals was completed, a decision had been rendered, and the time for rehearing had expired. Indeed, it was approximately two months after losing in the Ninth Circuit that the state of California, representing petitioner, raised this issue through a motion to recall the mandate (filed on April 3, 2000). Petitioner has offered no excuse for her failure to raise the point sooner, including in a suggestion for

rehearing en banc.[4] This Court does not ordinarily grant review to consider arguments never presented in a timely fashion in the courts below.[5]

c. Even if petitioner had made the argument set forth in the petition in a timely fashion below, and even if there were not a substantial possibility that this case will become moot, this is a very poor vehicle for resolving the question presented by petitioner. The reason is straightforward: it is far from clear that the result would be any different even if petitioner were to prevail in this Court. Because a ruling in petitioner's favor would likely amount to a mere advisory opinion, review should be denied.

As explained above, the district court *rejected* petitioner's first attempt to obtain dismissal for lack of exhaustion, reasoning that Section 1997e *was satisfied* by the allegations in respondent's original complaint that he "filed 'two 602 State Appeals, and several Letters of complaints to the Deputy Warden and the Program sergeant,'"

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[4] The California Attorney General's failure to raise the issue earlier in the Ninth Circuit is especially inexcusable because he had made all the same arguments in a petition for certiorari that was filed in *Rumbles*. See No. 99-537 Pet. for Certiorari, *Hill* v. *Rumbles* (filed on September 27, 1999). The petition for certiorari in *Rumbles* was denied on January 10, 2000, almost a month before the Ninth Circuit issued its decision in this case. See 120 S. Ct. 787.

[5] To make matters worse, it is at least arguable that petitioner *acknowledged* in the district court that exhaustion might not be required under Section 1997e(a) if the prison administrative process was incapable of supplying the relief sought by a prisoner. See Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint (filed on October 22, 1997), at 17 n.9 (stating that "since the type of relief sought by [Jones] is unknown, administrative remedies *cannot be said to be inapplicable*") (emphasis added). Because this statement was made before the Ninth Circuit decided either *Lunsford* or *Rumbles*, it necessarily reflects the Attorney General's understanding of the plain meaning of Section 1997e(a)'s language. See also pages 25-28, *infra*.

and by respondent's submission of a "CDC Memorandum * * * indicat[ing] that" he had "exhausted CDC administrative remedies with respect to his claims based upon placement in a cell with a gang member; and * * * at least informally presented to the prison his claims based upon false charges of gang membership and transfer between Calipatria facilities." Pet. App. 20a-21a. Although the trial court reached a different conclusion with respect to the amended complaint and petitioner's *second* motion to dismiss, that conclusion may well have rested on an unwillingness of the district court to consider the allegations relating to exhaustion in the original complaint (or the CDC Memorandum). If so, then the district court's ruling rests on a rather technical point relating to the relationship between the original and amended complaints, and not on any actual failure of respondent to exhaust his administrative remedies (which the district court concluded he had done with respect to the original complaint).

Moreover, in dismissing the amended complaint the trial court ignored respondent's unequivocal allegation in that document that "all administrative remedies[]" had been "exhausted" with respect to his allegations. C.A. ER 31. The district court faulted respondent for "fail[ing] to include *evidence*" with the amended complaint that would show "that he has exhausted his administrative appeals as required under 42 U.S.C. § 1997e." Pet. App. 9a (emphasis added); see also *id.* at 10a & n.6 (stating that respondent "must also include *proof* of exhaustion in any future complaint by attaching copies of the relevant administrative appeals submissions and

orders") (emphasis added); *id.* at 11a & n.7, 12a, 13a, 15a, 16a (same). The district court's decision to dismiss the amended complaint for failure to exhaust thus appeared to turn on the highly fact- and case-specific issue of how much proof was submitted by respondent in support of his allegation of exhaustion.

Moreover, the district court's ruling probably rested on a misunderstanding of the nature of the exhaustion defense. The district court appears to have assumed, incorrectly, that Section 1997e affected its subject matter jurisdiction (and therefore placed on respondent the burden of *proving* that Section 1997e had been satisfied). In fact, as the Ninth Circuit subsequently made clear in *Rumbles*, Section 1997e does *not* implicate the court's subject matter jurisdiction; it merely confers a right on defendants that may be waived if not invoked. See 182 F.2d at 1067-68; accord *Nyhuis* v. *Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000); *Perez* v. *Wisconsin Dept. of Corrections*, 182 F.3d 532, 535-36 (7th Cir. 1999). "A prisoner's failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure." *Massey* v. *Helman*, 196 F.3d 727, 735 (7th Cir. 2000), pet. for cert. filed (May 30, 2000) (No. 99-1918); see also *Jenkins* v. *Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999). Because failure to exhaust is an affirmative defense, petitioner — not respondent — had the burden of proving that (contrary to respondent's allegation and prior showing) the admnistrative remedies had not been fully exhausted. *Massey*, 196 F.3d at 735.

Finally, this case is unusual because it involves an amended complaint that builds upon an original complaint that the district court determined passed muster under Section 1997e. In arguing for dismissal of respondent's amended complaint for failure to exhaust administrative remedies, petitioner focused on the "new allegations" in the amended complaint and argued that, "*if* the Court interprets these new allegations to be *separate* 'stand alone' *claims*, they must be dismissed as Plaintiff has not alleged in his amended complaint that he has exhausted his administrative remedies *as to each and every new allegation*." Memorandum of Points and Authorities in Support of Motion to Dismiss Amended Complaint (filed on October 22, 1997), at 16-17 (emphasis added). In ordering dismissal, the district court evidently accepted the premise of this argument as true (a debatable point) and went on to apply the exacting approach advocated by petitioner, according to which "each and every" allegation in a civil rights complaint must be raised with specificity in an inmate grievance procedure in order to satisfy Section 1997e. Of course, if Section 1997e does not embody such a slavishly literalistic, jot-and-tittle pleading requirement (and we think it does not), then the district court was wrong for yet another independent reason.

Because the Ninth Circuit's reversal was correct for all of these independent reasons, review should be denied. This Court should not expend its scarce resources resolving an issue that likely will make no difference to the outcome of the case before it.

II. The Intercircuit Conflict Alleged By Petitioner Is Weak.

Petitioner maintains that there is a "pronounced" and "entrenched" conflict in the circuits over whether Section 1997e(a) requires prisoners to exhaust internal prison grievance procedures even when those procedures offer no possibility of relief. Pet. 5-6. Specifically, petitioner argues that the Ninth Circuit's approach is consistent with decisions of the Fifth and Tenth Circuits, but conflicts with the approach taken by the Third, Sixth, Seventh and Eleventh Circuits. Petitioner's claim of conflict is seriously overstated.

To be sure, petitioner is correct in observing that the Ninth Circuit's approach has also been endorsed by the Fifth and Tenth Circuits. *Whitley* v. *Hunt*, 158 F.3d 882, 887 (5th Cir. 1998) ("We join the Ninth and Tenth Circuits in adopting the rule that federal prisoners pressing *Bivens* claims against federal officials need not pursue prison remedies when they are seeking exclusively monetary relief, and there are no prison remedies capable of affording such relief."); *Garrett* v. *Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997) (adopting same rule).[6]

Petitioner claims that the Third and Eleventh Circuits have reached the opposite conclusion. Pet. 5-6 (citing *Nyhuis* v. *Reno*, 204 F.3d 65 (3d Cir. 2000), and

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[6] Petitioner notes that a subsequent panel of the Fifth Circuit has voiced disagreement with the result in *Whitley*, and urged the parties to seek en banc review. See *Wright* v. *Hollingsworth*, 201 F.3d 663 (5th Cir. 2000), pet. for reh'g en banc filed (Feb. 29, 2000). Unless and until the Fifth Circuit decides both to rehear the issue en banc and to overrule *Whitley*, however, the Fifth Circuit's approach will remain consistent with the Ninth Circuit's.

Alexander v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998)). She freely admits, however, that both of those cases involved claims not only for damages but also for injunctive relief. Pet. 5; see *Nyhuis*, 204 F.3d at 67, 70; *Alexander*, 159 F.3d at 1322-23; see also *Booth* v. *Churner*, 206 F.3d 289, 299-300 & n.10 (3d Cir. 2000) (citing *Nyhuis* and reaching same result in case where prisoner asserted claims for damages as well as injunctive relief in his complaint), pet. for cert. filed (June 5, 2000) (No. 99-1964). With one very recent exception, the courts of appeals have uniformly ruled that such "mixed" claims must be exhausted because of the possibility that an inmate might obtain some measure of relief in the administrative process on his or her non-damages claims. See *Nyhuis*, 204 F.3d at 70; *Alexander*, 159 F.3d at 1325.[7] In addition, the Eleventh Circuit in *Alexander* expressly distinguished the Tenth Circuit's decision in *Garrett* on the ground that the latter "involved claims for only monetary relief," whereas "Alexander seeks both monetary and injunctive relief." 159 F.3d at 1327. Accord *Nyhuis*, 204 F.3d at 70 (stating that case before it was "distinguishable" from *Garrett* and from decisions of the Fifth and Ninth Circuits because the prisoner "requests a mix of remedies, some of which were and some of which were not available under the Bureau of Prisons' administrative process."). Because *Alexander*

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[7] The lone exception is the Tenth Circuit, which recently held that in mixed cases where money damages are not available through the inmate grievance procedure, a prisoner may proceed *on the damages claims* in federal court without first submitting those claims to the inmate grievance procedure. See *Miller* v. *Menghini*, 2000 U.S. App. LEXIS 11028 (10th Cir. May 18, 2000).

and *Nyhuis* involved mixed claims as to which exhaustion of administrative procedures was not futile, statements in those cases about how damages-only claims would be treated was obviously dicta that any subsequent panels in those circuits would be entirely free to disregard.

That leaves two circuits that petitioner claims have taken positions that conflict with the decision below — the Sixth Circuit in *Wyatt* v. *Leonard*, 193 F.3d 876, 878 (1999), and the Seventh Circuit in both *Massey* v. *Helman*, 196 F.3d 727 (2000), pet. for cert. filed (May 30, 2000) (No. 99-1918), and *Perez* v. *Wisconsin Dept. of Corrections*, 182 F.3d 532 (2000). As the Third Circuit correctly observed in *Nyhuis*, however, the Seventh Circuit appears to acknowledge that Section 1997e does not require a prisoner seeking only monetary relief to resort to an inmate grievance procedure where that procedure truly offers no prospect of a remedy. *Nyhuis*, 204 F.3d at 69 n.3. Thus, in *Perez*, Judge Easterbrook, writing for the panel, explained that the lawsuit of a prisoner who was seeking only monetary relief for inadequate medical care should have been dismissed under Section 1997e because the inmate failed to exhaust prison remedies that might have provided some relief — even though the relief provided was not the "prisoner's *preferred* remedy." 182 F.3d at 537 (emphasis in original). Judge Easterbrook reasoned that if the prisoner had sought intra-prison relief for his back injury, the state might have opted for the surgery desired by the inmate. Therefore, the Seventh Circuit required exhaustion where *some* relief was

possible, even if the relief is not the "prisoner's *preferred* remedy." *Ibid.* Judge Easterbrook noted, however, that "[i]t is possible to imagine cases in which the harm is done and no further administrative action could supply *any* 'remedy.'" *Id.* at 538 (emphasis added). Judge Easterbrook gave the following illustration:

> Suppose [a] prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

Ibid. Thus, petitioner is wrong to say that the Seventh Circuit interprets Section 1997e as imposing an absolute requirement, in every case, that inmates "avail themselves of prison grievance procedures, even when these procedures" do not provide any possibility of a remedy. Pet. 5.[8]

Nor does the Sixth Circuit read Section 1997e as imposing the absolute, inflexible exhaustion command urged by petitioner. True enough, the court in *Wyatt* did hold that under Section 1997e, a prisoner seeking only monetary relief must exhaust internal prison grievance procedures even when those procedures do not offer damages as a remedy. But the Sixth Circuit also stated:

> Although it makes sense to excuse exhaustion of the prisoner's complaint where the prison system has a flat rule declining jurisdiction over such cases, it does not make sense to excuse the failure to exhaust when the prison system will hear

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[8] In *Massey*, the Seventh Circuit reiterated Judge Easterbrook's hypothetical but found that the prisoner did not qualify as someone for whom the administrative process truly offered no possibility of relief. See 196 F.3d at 734.

> the case and attempt to correct legitimate claims by providing some remedy, even though it will not pay damages. In *Perez* v. *Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999), the Seventh Circuit made this distinction in a state prisoner medical case. It held that a prisoner must exhaust administrative remedies in a money damages case unless administrative action could provide no remedy of any kind.

Wyatt, 193 F.3d at 878. Accord *Freeman* v. *Francis*, 196 F.3d 641, 643 (6th Cir. 1999). Thus, the Sixth Circuit appears not only to agree with the Seventh Circuit's position in *Perez*, but also to recognize a further exception to Section 1997e when the relevant prison grievance procedure "has a flat rule" excluding certain types of claims (such as tort claims) from consideration.

The point is not that the Sixth and Seventh Circuits follow exactly the same reading of Section 1997e that has been adopted by the Fifth, Ninth and Tenth Circuits. They do not: while the latter circuits will excuse exhaustion where the type of relief sought by the inmate is not available in the inmate grievance procedure, the Sixth and Seventh Circuits will look further and excuse exhaustion only where no *other* form of relief could be provided by that procedure (even relief that is different from the kind requested by the inmate). Moreover, the Sixth Circuit will excuse exhaustion when the prison grievance procedure excludes a category of claims from any consideration at all. The differences between these approaches are slight, and they do not warrant this Court's intervention. For that reason, and because numerous circuits have not yet

squarely ruled on the issue presented by petitioner, this Court should await further percolation of the issue in the lower courts.[9]

Finally, it bears emphasizing that *no* circuit appears to have endorsed (in an actual holding as opposed to dictum) the absolute, inflexible reading of Section 1997e that petitioner is advocating here.[10] Even the United States government, which defends *Bivens* actions involving *federal* prisoners on a nationwide basis and thus has even greater reason than petitioner and her *amici* to adopt a narrow interpretation of Section 1997e, has rejected the extreme reading urged by petitioner here. See *Lunsford*, 155 F.3d at 1179 (in case involving *Bivens* claim, "agree[ing] with both parties" — including the United States — that a prisoner seeking only damages was "not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the [Bureau of Prison's] Administrative Remedy Program only provides for injunctive relief"); *Nyhuis*, 204 F.3d at 66-67 (noting in *Bivens* action

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[9] This case is also an inappropriate vehicle for resolving the modest tension between those circuits that excuse exhaustion where the remedy requested by an inmate is unavailable in the grievance procedure and those that also require that there be no other form of practical relief available to the inmate. Respondent would prevail under either test. He won under the first approach below, and he would also prevail under the Seventh Circuit's view because he has been transferred out of the facility whose conditions are the subject of his complaint and thus his only possibility of relief is through a damages remedy.

[10] California has made even more extreme arguments, without success, in other cases. See *Rumbles*, 182 F.3d at 1069-70 (in case involving other California prison officials, rejecting argument that Section 1997e requires inmates to exhaust not only futile California inmate grievance procedure but also separate administrative procedures under the California Tort Claims Act). Because the question presented in the petition is limited to "internal prison grievance procedures" (Pet. i), it forecloses the more extreme argument advanced and soundly rejected in *Rumbles*.

brought by federal prisoner that the United States had "suggested in [its] briefing and at oral argument that * * * a futility exception [to Section 1997e] may be appropriate under certain circumstances"). It is not this Court's traditional role to consider arguments that have not been adopted by *any* lower court.[11]

III. The Decision Below Is Plainly Correct.

The Ninth Circuit held that respondent, who has abandoned all but his damages claims, was not required under 42 U.S.C. § 1997e(a) to present his damages claims to California's inmate grievance procedure, because the procedure does not include any damages remedy to inmates. Pet. App. 2a. The lower court relied on several previous

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[11] Petitioner and her *amici* advance a variety of meritless arguments for why the issue presented in the petition is sufficiently important to warrant this Court's review. Pet. 10-12; *Amicus* Br. 3-8. For example, they maintain that the Ninth Circuit's approach "forecloses the possibility of an administrative resolution of disputes" (Pet. 10-11) and "undermin[es] the effectiveness of [state] administrative dispute resolution systems where they are needed most" (*Amicus* Br. 4). That argument rings hollow, because the Ninth Circuit excuses an inmate from exhaustion only where the administrative dispute process is *incapable* of resolving the dispute because the state has elected to withhold the only remedy sought by the inmate. Equally baseless is *amici*'s exaggerated contention (at 3-4) that the decision below "creates an exception that effectively abrogates the statute's general rule" requiring exhaustion, because "almost all prisoners seek damages." As explained above, every circuit other than the Tenth requires mixed claims to be exhausted; it is only where a prisoner seeks *only* damages (*and* where the grievance procedures *withhold* that remedy) that the Ninth Circuit excuses exhaustion. Nor does the decision below "thwart[] Congress's goal of reducing prisoner litigation." Pet. 10. Prisoner claims will hardly be resolved short of litigation by requiring inmates to go through a meaningless process that offers no hope of a remedy. Nor does the Ninth Circuit's decision "deprive [prison] officials" of "invaluable data about the nature and potential solutions" for problems within the prison walls. *Amici* Br. 6. Prisoner complaints brought under Section 1983 are served on individual defendants who are prison officers and officials, as well as relayed to lawyers in the Attorney Generals' offices who ordinarily defend these cases. Finally, as explained in text, the issue presented in the petition is not "critically important to the nation's more than 4,372 prisons and jails." *Id.* at 3. While prisoner lawsuits advancing mixed claims are commonplace in the federal courts, the majority of circuits have yet to resolve the precise issue presented in a damages-only context (and this even though the PLRA has been on the books for more than four years).

Ninth Circuit decisions (*Lunsford* and *Rumbles*) that reached the same result. In *Lunsford*, the Ninth Circuit "agreed with both parties" — including, as noted above, the United States government, which was representing the federal officials who were defendants — that Section 1997e(a) does not require a prisoner seeking only damages to "exhaust his administrative remedies before filing this lawsuit in light of the fact that the Administrative Remedy Program [in the Bureau of Prisons] only provides for injunctive relief." 155 F.3d at 1179. And in *Rumbles*, the Ninth Circuit affirmed a lower court's conclusion that "because California's administrative prison grievance process does not allow for monetary damages, this form of relief does not constitute an 'available' remedy that must be exhausted" within the meaning of Section 1997e(a). 182 F.3d at 1067.

Petitioner now argues that the Ninth Circuit's position is inconsistent with the language of Section 1997e(a). The argument is wrong. As the Ninth Circuit has explained, by its plain terms Section 1997e(a) only requires exhaustion of "such administrative *remedies* as are *available*." 42 U.S.C. § 1997e(a) (emphasis added). As the United States government cogently explained in *Lunsford*:

> By the time inmate Lunsford lodged the complaint in this case, in August, 1996, he has received his surgery. As is apparent from his Complaint, inmate Lunsford sought no corrective action at that time from the Bureau of Prisons and, more importantly, there was no corrective action possible (or "available," the term used in 42 U.S.C. § 1997e(a)). Because monetary compensation is not "available" to any *Bivens* plaintiff through the administrative remedy system, the

> Appellees conceded it would have been futile for inmate Lunsford to have exhausted administrative remedies in August 1996.

Appellees' Petition for Rehearing, *Lunsford* v. *Jumao-As*, No. CA 96-56503, at 5-6. That interpretation of Section 1997e(a), which the United States government urged with respect to what was then an open question in the Ninth Circuit (and which was presumably also approved by the Solicitor General), is eminently correct. Accord *Perez*, 182 F.3d at 538 (per Easterbrook, J.) ("If the [inmate's] injury has healed by the time suit begins, nothing other than damages could be a 'remedy,' and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.").

Petitioner argues, however, that Section 1997e overrules the traditional futility exception to administrative exhaustion and compels inmates to go through the pointless exercise of submitting their complaints to any grievance procedure that exists, regardless of whether it offers any prospect of a remedy. Pet. 6-7. Petitioner is simply seeking to rewrite the statute, which requires prisoners to exhaust "all administrative *remedies* as are *available*" — not to exhaust "all administrative *procedures* that are *in existence*." Moreover, the ordinary meaning of the words "available" and "remedy" are, respectively, "obtainable" and "[t]he means by which * * * the violation of a right is * * * redressed or compensated." BLACK'S LAW DICTIONARY 123, 1163 (5th ed. 1979). If an inmate grievance process does not offer

any means by which the violation of an inmate's rights may be redressed, it does not offer him any "remedy" that is "available."

Unable to find support in the language of Section 1997e(a), petitioner falls back on the legislative history, which she contends "irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process." Pet. 7. To support that sweeping assertion, petitioner points to Congress's omission of the phrase "plain, speedy, and effective" from a prior version of Section 1997e. *Ibid.* But the prior version of Section 1997e imposed a duty on the Attorney General to promulgate minimum standards for "plain, speedy, and effective" state inmate grievance procedures, and required either the Attorney General or a federal court to certify that a state procedure, taken as a whole, satisfied these standards before exhaustion could be required. 42 U.S.C. § 1997e(a) (1994); see *Patsy* v. *Board of Regents*, 457 U.S. 496, 509-11 (1982). Because the PRLA eliminated this requirement of pre-certification of state grievance systems, it dropped the "plain, speedy, and effective" language from Section 1997e. It does not follow that Congress intended to abrogate the traditional futility exception in every individual case. Neither is it true that honoring the traditional futility exception in individual cases will reinsert the omitted language into Section 1997e or deprive the amendments made by the PLRA of "'real and substantial effect.'" *Nyhuis*, 204 F.3d at 72 (quoting *Stone* v. *INS*, 514 U.S. 386, 397 (1995)).

Equally mistaken is petitioner's argument that the decision below "ignores the * * * legislative history of § 1997e." Pet. 6. To begin with, "it must be acknowledged that the PLRA was not subject to very intense scrutiny or debate in Congress." Kuzinski, *The End of the Prison Law Firm?*, 29 RUTGERS L.J. 361, 376 n.79 (1998). As Professor Herman has explained:

> The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate. The Act was passed as a rider to the Balanced Budget Downpayment Act, without a Judiciary Committee Report and without committee mark-up. Its provisions, which amend a number of different sections of the United States Code, bear many signs of the haste with which they were passed. Key terms were not defined, some provisions conflicted with pre-existing law, and even the title could have used editing: entitled The Prison Litigation Reform Act of 1995, it was actually passed in 1996.

Herman, *Slashing and Burning Prisoners' Rights: Congress and The Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) (citations omitted). Moreover, the isolated floor statement of Representative Lobiondo on which petitioner premises her entire argument relates to a bill, H.R. 2076, that was vetoed by President Clinton. See Presidential Veto Message of H.R. 2076, H. Doc. No. 104-149 (1995); Postponing Consideration of Veto Message on H.R. 2076, 141 Cong. Rec. H 15156 (daily ed. Dec. 19, 1995) (statement of Rep. Rogers). In any event, Representative Lobiondo's statement does not say that prisoners must resort to prison grievance procedures even when it would be futile to do so. It says that Representative Lobiondo hoped to require prisoners who are "contesting" some aspect of their incarceration — a word that

suggests a request for prospective changes rather than damages for a past event — to submit their claims first to an "administrative *remedy* process."

As for petitioner's various policy arguments, they are all misplaced. See also note 11, *supra*. Federalism or efficiency values are simply not offended by allowing prisoners who are claiming that their constitutional rights have been violated by state officials to avoid state grievance procedures that offer no possibility of resolving the prisoner's claims. Conspicuously absent from the petition, moreover, is any acknowledgement that, in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992), this Court *unanimously* rejected many of the same policy arguments advanced by petitioner in holding that a federal prisoner seeking only damages in a *Bivens* action need not exhaust the administrative procedures in the Bureau of Prison, because these procedures do not include a damages remedy. *Id.* at 152-56. The same concerns apply with equal force here and confirm the correctness of the Ninth Circuit's approach.

Moreover, petitioner is wrong to suggest that the Ninth Circuit's approach places onerous burdens on the federal judiciary. Pet. 11. If the reported cases are any indication, the vast majority of prisoner lawsuits involve either non-damages claims only or "mixed" claims — lawsuits that (in all but the Tenth Circuit) are subject to Section 1997e's exhaustion requirement. In the small number of damages-only cases, it should be readily apparent from the face of the pleadings alone that the prisoner is limiting his claim for relief to damages (or some kind of claim as to which no remedy

is available in the grievance process). In addition, because exhaustion is an affirmative defense, it is reasonable to expect that defendants will conduct the initial screening and raise the exhaustion issue only where there is a valid argument to be made. Finally, the burden on courts in excusing a small category of prisoner cases from exhaustion is not necessarily any greater than the burden of requiring automatic exhaustion in that category. The reason is straightforward: when the cases ordered to be exhausted return to the federal courts, judges will sometimes have to resolve difficult questions about the meaning of state grievance procedures (such as whether all remedies have been exhausted in a timely fashion). Cf. *Patsy*, 457 U.S. at 513-14. The district court in this case took note of some of these difficult questions. See pages 4-5, *supra* (quoting Pet. App. 20a-21a).[12]

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[12] We note that petitioner in this case was a key decisionmaker in the very administrative grievance process to which she claims respondent was required to submit his damages claims. It would strange indeed — and possibly a due process violation — to require an injured prisoner to submit his claim to the very person he holds responsible for depriving him of his constitutional rights. See *McCarthy*, 503 U.S. at 153 (noting that "it appears that prison officials — perhaps the very officials subject to suit — are charged with" making decisions under the grievance procedure); *Felder* v. *Casey*, 487 U.S. 131, 149 (1988) (Wisconsin notice-of-claim statute, in Section 1983 action, "forces [the] injured persons to seek satisfaction from those alleged to have caused the injury in the first place").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY 2000

No. 99-1730

In the Supreme Court of the United States

SILVIA H. GARCIA,

Petitioner,

v.

MONROE JONES,

Respondent.

CERTIFICATE OF SERVICE

I, Alan E. Untereiner, counsel of record for the respondent and a member of the bar of this Court, hereby certify that on this 14th day of July, 2000, I caused the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and the BRIEF IN OPPOSITION to be served by first-class mail, postage prepaid, on each of the following:

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I further certify that all parties required to be served have been served.

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(4)

No. 99-1730

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IN THE SUPREME COURT OF THE UNITED STATES

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 99-1730

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

PETITIONERS' REPLY BRIEF

Three petitions scheduled for the Court's September 25, 2000 Conference raise important questions regarding § 1997e's exhaustion requirement: this one, and the petitions in *Booth v. Churner*, No. 99-1964, and *Massey v. Hellman*, No. 99-1918. The important questions raised by these cases are:

> 1. Does § 1997e require prisoners to exhaust internal prison grievance processes that do not confer monetary awards before bringing actions solely for damages?
>
> 2. Does an inmate's allegation of excessive force amount to a claim "with respect to prison conditions" for which exhaustion is required under § 1997e?

Because these questions are exceptionally important, and because there is widespread disagreement in the circuits as to how they should be answered, the Court should seize this opportunity to resolve them. This case, however, may not be

the best vehicle through which to address the issues because its continued justiciability is ambiguous in light of recent developments in the trial court.[1] Instead of granting this petition, the Court should hold it and certify for review these questions in *Booth* and *Massey*.

These questions should be resolved this Term because the circuit decisions addressing them are hopelessly fractured, and the need for Court guidance is acute. Respondent's attempt in his opposition in this case to minimize the circuit disagreements by advancing hair-splitting distinctions in the conflicting opinions only underscores the confusion.

Respondent recognizes that on one side of the split are the circuits that excuse exhaustion. On this side, the Ninth and Tenth Circuits allow a prisoner suit to proceed, notwithstanding a failure to exhaust administrative remedies, when only damages are sought and prison remedies would not have provided a monetary award. *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), cert. denied, 120 S. Ct. 787 (2000)[2]; *Garrett v. Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997). But even on this side, respondent admits that there is confusion. Although one panel of the Fifth Circuit has concurred with the Ninth and Tenth Circuit, *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1988), another panel has expressed its disapproval of their holdings. *Wright v. Hollingsworth*, 201 F.3d 663, reh'g en banc granted, No. 99-40063, 2000 WL 1238921 (5th Cir. Aug. 31, 2000).

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1. On August 17, 2000, the district court dismissed this case on alternative grounds. Although to date no notice of appeal has been docketed, the case may not be final because the Ninth Circuit adopts a modified mailbox rule governing the filing of inmates' notices of appeal.

2. The inmate in *Rumbles* died while the petition for certiorari was pending in that case.

On the other side of the split are the circuits that require exhaustion. On this side, respondent accepts that the Third and Eleventh Circuits require exhaustion before an inmate may pursue a suit -- at least in cases in which the prisoner has brought claims for both damages and injunctive relief ("mixed cases") -- regardless of whether prison remedies would have provided a monetary award. *Nyhius v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000); *Alexander v. Hawk*, 159 F.3d 1321, 1322-23 (11th Cir. 1998). But even within this group of cases, there is a disagreement. As respondent points out, the Third and Eleventh Circuits hold that § 1997e requires administrative exhaustion before *any* portion of a mixed case may proceed. *Nyhius*, 204 F.3d at 70; *Alexander*, 159 F.3d at 1325. In direct conflict, the Tenth Circuit holds that only the *injunctive relief* portion of a mixed case is stayed when there has been a failure to exhaust. *Miller v. Menghini*, 213 F.3d 1244, 1246 (10th Cir. 2000).

Also on this side of the split, Respondent concedes that the Sixth and Seventh Circuits require exhaustion even when damages are the only remedy sought and the prison remedies were incapable of providing a monetary award. *Massey v. Hellman*, 196 F.3d 727, 732 (7th Cir. 2000) (relying on *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537-38 (7th Cir. 1999)); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999); *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). He attempts to distinguish these decisions from those excusing exhaustion by arguing that these courts only insisted on exhaustion because the prisoner might have been able to obtain *some* kind of relief in the administrative process, even if not money.

But this is a false distinction that does nothing to minimize the circuit conflict. The Fifth, Ninth, and Tenth Circuits excuse exhaustion whenever the inmate seeks damages and money is unavailable in the prison grievance process, *regardless* of whether the inmate might have received some other kind of benefit by pursuing his administrative remedies.

Thus, even under respondent's own analyses of the circuit decisions, the conflict is irreconcilable.

Finally, and to add to the disparate approaches among the circuits, last month the Second Circuit split with the Third, Sixth, and Eleventh Circuits on whether allegations of excessive force constitute a claim "with respect to prison conditions" for which exhaustion is required under § 1997e at all. *Nussle v. Willette*, No. 99-0387, 2000 WL 1199957, *9 (2d Cir. Aug. 24, 2000); *Freeman v. Francis*, 196 F.3d at 643-44; *Booth v. Churner*, 206 F.3d 289, 293-98 (3rd Cir. 2000); *Higginbottom v. Carter*, No. 99-8055, 2000 WL 1179793, *1 (11th Cir. Aug. 21, 2000). Although the petitioner in *Booth* did not raise this precise issue in his petition, his case alleging claims of excessive force presents the Court with an excellent opportunity to address and resolve this conflict.

Whether § 1997e requires inmates to exhaust administrative remedies when they exclusively seek damages or allege excessive force are questions that are critically important to California, to the 37 states that have urged the Court to grant the petition in this case, to prison administrators in the Nation's thousands of prisons and jails, and to the lower appellate courts, which desperately need Court guidance. Because this case is no longer in the best posture for the Court to resolve these issues, the Court should hold this petition and certify for review these questions in *Booth* and *Massey*.

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Respectfully submitted,

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